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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

JOSE A. MORALES (Deceased/Employee),
JULIA CORPUS de MORALES (Widow),
JUAN ANTONIO MORALES and DANIEL MORALES
(Minor Children),

Petitioners,

v.

BARGE-WAGENER CONSTRUCTION COMPANY
(Employer)
and
ARGONAUT INSURANCE COMPANY
(Insurer),

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court For The State Of Georgia

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF GEORGIA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Georgia's workers' compensation statute violates the Equal Protection Clause of the Fourteenth Amendment by limiting employees' death benefits to a maximum of $1,000.00 if they are survived by non-resident alien dependents (who are not citizens or residents of the United States or Canada), while granting all other employees uncapped benefits for their dependents?

2. Whether Georgia's workers' compensation statute imposes additional burdens on the terms of residence of alien workers in conflict with Congress's exclusive authority over naturalization and immigration policy, rendering the statutory provision at issue invalid under the Supremacy Clause?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 5

I. INTRODUCTION 5

II. THE GEORGIA STATUTE VIOLATES THE EQUAL PROTECTION CLAUSE BY IMPERMISSIBLY DISCRIMINATING ON THE BASIS OF ALIENAGE 7

A. The Georgia Supreme Court Improperly Failed to Focus its Constitutional Analysis on the Resident Alien Worker who has been Deprived of Workers' Compensation Protection for His Family 7

B. As a Statutory Classification Based on Alienage, O.C.G.A. § 34-9-265(b)(5) Must be Reviewed Based on the "Strict Scrutiny" Standard of Constitutional Review 14

C. Georgia's Discriminatory Death Benefit Provision Fails to Satisfy Equal Protection Analysis Under Strict Scrutiny or Under a Rational Relationship Test 17

TABLE OF CONTENTS – Continued

Page

1. There is No Rational Basis for Discriminating Between the Two Countries With Which This Nation Shares its Borders... 17

2. "Administrative Ease" Cannot Justify the Discrimination Effected by this Provision 19

3. The Statute Cannot be Justified on the Basis of Cost to the Employer or Insurer 21

4. The Statutory Limit of $1,000 on Death Benefits for Alien Workers is an Anachronism Which Has Remained Unchanged for 73 Years, While Death Benefits for all Other Workers Have Consistently Increased Over the Years..... 22

5. The Purpose of Workers' Compensation Insurance is to Provide a Quid Pro Quo to Employees Sacrificing Their Common Law Remedies for a Uniform System of Benefits Available in the Case of Injury or Death on the Job 23

D. Certiorari Should be Granted Because the States are Divided in Analyzing the Constitutionality of Death Benefits Provisions Which Discriminate Against Employees Survived by Non-Resident Alien Dependents 24

TABLE OF CONTENTS – Continued

Page

III. O.C.G.A. § 34-9-265(b)(5) IS INVALID UNDER THE SUPREMACY CLAUSE BECAUSE IT IMPOSES A DISCRIMINATORY BURDEN UPON ALIENS LAWFULLY WITHIN THE UNITED STATES AND CONFLICTS WITH CONGRESS'S EXCLUSIVE CONSTITUTIONAL AUTHORITY TO REGULATE IMMIGRATION AND NATURALIZATION..... 26

IV. CONCLUSION..... 28

APPENDIX

Denial of the Petition for Reconsideration by the Supreme Court of Georgia.....1A

Opinion of the Supreme Court of Georgia.....2A

Opinion of the Superior Court of Fulton County, State of Georgia.....14A

Order of the State Board of Workers' Compensation, State of Georgia.....20A

Order of the Administrative Law Judge, State Board of Workers' Compensation, State of Georgia.....22A

TABLE OF AUTHORITIES

Page

CASES:

Alegria v. United States, 945 F.2d 1523 (11th Cir. 1991) 11

Alvarez Martinez v. Industrial Commission of Utah, 720 P.2d 416 (Utah 1986) 25, 26

Argonaut Insurance Co. v. King, 127 Ga. App. 566 (1972) 20

Bernal v. Fainter, 467 U.S. 216 (1984) 14, 16

Cabell v. Chavez-Salido, 454 U.S. 432 (1982) 14

Califano v. Goldfarb, 430 U.S. 199 (1977) 8, 9, 10

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 11

De Ayala v. Florida Farm Bureau Casualty Insurance Co., 543 So.2d 204 (Fla. 1989) 18, 22, 24, 25

Examining Board v. Flores de Otero, 426 U.S. 572 (1976) 16

Frontiero v. Richardson, 411 U.S. 677 (1973) 9, 20

Glenn Falls Indemnity Co. v. Jordan, 56 Ga. App. 449 (1937) 20

Graham v. Richardson, 403 U.S. 365 (1971) ..... *passim*

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) ... 6, 16, 28

Huyett v. Pennsylvania Railroad, 86 N.J. 683, 92 A. 58 12

In Re Griffiths, 413 U.S. 717 (1973) 6, 16, 28

Jalifi v. Industrial Commission of Arizona, 132 Ariz. 233, 644 P.2d 1319 (1982) 19, 25, 26

TABLE OF AUTHORITIES – Continued

Page

Johnson v. Eisentrager, 339 U.S. 763 (1950) 10

Jurado v. Popejoy Construction Co., 853 P.2d 669 (1993) ..... *passim*

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 11

Madera Sugar Pine Co. v. Industrial Accident Commission of California, 262 U.S. 499 (1923) 6, 8, 12, 13, 23

Matthews v. Diaz, 426 U.S. 67 (1976) 16

Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1976) 11

Morales v. Barge-Wagener Construction Company, 263 Ga. 190, 429 S.E. 2d 671 (1993) ..... *passim*

Newport News Shipbuilding & Dry Dock v. EEOC, 462 U.S. 682 (1983) 9

Nyquist v. Mauclet, 432 U.S. 1 (1977) 6, 11, 15, 16

Pedrazza v. Sid Fleming Contractor, Inc., 94 N.M. 59, 607 P.2d 597 (1980) 24, 25, 26

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 14

Plyler v. Doe, 457 U.S. 202 (1982) 11, 18

Sugarman v. Dougall, 413 U.S. 634 (1973) 11, 16

Takahashi v. Fish & Game Commission, 334 U.S. 410 (1948) 26, 27

Toll v. Moreno, 458 U.S. 1 (1982) 14, 26, 27

Truax v. Raich, 239 U.S. 33 (1915) 27

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 6, 8, 9, 10

TABLE OF AUTHORITIES – Continued

Page

Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980) ..... *passim*

Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 P. 491 (1917) 12

STATUTES:

28 U.S.C. § 1257(a) 2

Official Code of Georgia Annotated § 33-9-12 21

Official Code of Georgia Annotated § 33-9-21(a)(2) 21

Official Code of Georgia Annotated § 34-9-13 20

Official Code of Georgia Annotated § 34-9-261 ....3, 22

Official Code of Georgia Annotated § 34-9-358(a) 21

Official Code of Georgia Annotated § 34-9-265 (1991) ..... *passim*

CONSTITUTIONAL PROVISIONS:

United States Constitution, Art. I, § 8, cl. 3 and 4 26

United States Constitution, Amendment XIV .... *passim*

United States Constitution, Art. VI..... 5, 26, 27, 28

HISTORICAL TREATISES:

M. Konvitz, *The Alien and the Asiatic in American Law* (1946) 6, 28

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(Employer)
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

COMES NOW Julia Corpus de Morales, widow of the deceased employee, Jose A. Morales, and mother of their minor children Juan Antonio Morales and Daniel Morales, and respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Georgia in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Georgia (App. 2A-13A) is reported at 263 Ga. 190 (1993) and at 429 S.E.2d 671 (1993). The opinions of the Superior

Court of Fulton County, State of Georgia (App. 14A-19A), the State Board of Workers' Compensation (App. 20A-21A), and the Administrative Law Judge for the State Board of Workers' Compensation (App. 22A-26A) are unreported.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on May 24, 1993, and a petition for reconsideration was denied on June 18, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

O.C.G.A. § 34-9-265 (1991)

> (b) If death results instantly from an accident arising out of and in the course of employment or if during the period of disability caused by an accident death results proximately therefrom, the compensation under this chapter shall be as follows:
>
> . . .
>
> (2) The employer shall pay the dependents of the deceased employee, which dependents are wholly dependent on his earnings for support at the time of the injury, a weekly compensation equal to the compensation which

> is provided for in Code Section 34-9-261 for total incapacity;
>
> . . .
>
> (5) If the employee leaves dependents who are not citizens or residents of the United States or the Dominion of Canada at the time of the accident, the amount of compensation shall not exceed $1,000.00.

STATEMENT OF THE CASE

Statement of Facts

Jose Morales was employed as a construction worker by Barge-Wagener Construction Company in Atlanta, Georgia, when he fell 22 stories to his death on September 19, 1990. His death occurred in the course of his employment and was compensable under Georgia's Workers' Compensation Act. Thus, Mr. Morales' family was barred from bringing a tort suit against his employer to recover for his death. However, the death benefits regularly provided under Georgia's Workers' Compensation Act were also unavailable.

Jose Morales was a Mexican citizen and legal alien residing in the United States of America. His wife, Julia Corpus de Morales, and two minor children, Juan Antonio Morales and Daniel Morales, were solely dependent upon him for their support and were citizens and residents of Mexico. Because Mr. Morales was an alien and his family did not reside in either the United States or Canada, his death benefits under Georgia law were limited to the sum of $1,000.00.

Proceedings Below

This case was first decided by the Administrative Law Judge (ALJ) for the State Board of Workers' Compensation for the State of Georgia. The constitutionality of the state statute limiting recovery of death benefits to the dependents of alien workers who reside outside the United States or Canada (O.C.G.A. §34-9-265(b)(5)) was challenged in the first instance by Petitioners in this proceeding. (App. 24A-25A)

While the ALJ found that she was without jurisdiction to rule on the constitutionality of the statute, she stated that, "[i]t is my opinion that the dependents will prevail on this issue, there being no apparent rational basis for the legislature to distinguish between citizens of Canada and citizens of any other country that might be working in the United States and injured [sic] on the job." (App. 24A)

Instead of awarding a weekly benefit until the widow reached age 65 and the minors reached 18, graduated high school or finished college – an amount equal to several hundred thousand dollars – the ALJ awarded the statutory maximum of $1,000.00 available if alien workers' dependents are not citizens or residents of the United States or Canada. The ALJ's decision was upheld on review by the State Board of Workers' Compensation. (App. 20A-21A)

On appeal to the Superior Court of Fulton County for the State of Georgia, the Court reversed and held the discriminatory death benefit provision to be unconstitutional under the Georgia Constitution, finding both a violation of the Equal Protection Clause and a denial of a fundamental property right. (App. 14A-19A) Having made its decision under the Georgia Constitution, the Court found it unnecessary to reach the federal constitutional claim. (App. 19A)

The employer's insurance company appealed to the Georgia Supreme Court, which reversed again and upheld the constitutionality of the state statute. (App. 8A) The Court focused exclusively on the rights of the non-resident alien dependents, and refused to consider that the statute violated Mr. Morales' rights under the Equal Protection Clause. (App. 4A) The Court held that:

> O.C.G.A. §34-9-265(b) surely discriminates against Mr. Morales' family in Mexico, but it is not unlawful. They must settle for what the legislature of this state is willing to provide.

(App. 6A)

ARGUMENT SUPPORTING THE GRANT OF THE WRIT

I. INTRODUCTION

This case calls upon the Court to revisit the constitutional issues raised by *Graham v. Richardson*, 403 U.S. 365 (1971), and its progeny that largely struck down this nation's troubling legacy of state laws enacted since the turn of the century which discriminated on the basis of alienage. The judgment of the Georgia Supreme Court sustaining the constitutionality of Georgia's workers' compensation death benefit provision which limits recovery based on alienage strongly conflicts with this Court's precedents under the Equal Protection Clause, as well as the Supremacy Clause. Furthermore, there is a split among the highest state courts of six states that have reviewed comparable provisions which requires resolution by this Court.

Certiorari should be granted in this case to review whether Georgia's Workers' Compensation Act violates the Equal Protection Clause by limiting the recovery of death benefits for employees survived by non-resident alien dependents who are not citizens or residents of the

United States or Canada to a maximum of $1,000 while all other employees' dependents receive uncapped benefits based upon the earnings of the deceased employee. O.C.G.A. § 34-9-265 (1991). In the instant case, the Georgia statutory scheme deprived Jose Morales of the same workers' compensation death benefits coverage for family dependents residing in Mexico as were extended to his American and Canadian co-workers for their family dependents.

The Georgia Supreme Court's decision, determining that the statutory classification's discriminatory impact on Jose Morales does not trigger coverage of the Equal Protection Clause, is contrary to this Court's long standing analysis of workers' compensation laws as well as established equal protection doctrine. *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Graham v. Richardson*, 403 U.S. 365; *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Madera Sugar Pine Co. v. Industrial Accident Commission of California*, 262 U.S. 499 (1923). The decision harkens back to an era when statutory discrimination on the basis of alienage was routinely and summarily approved. *See, Hampton v. Mow Sun Wong*, 426 U.S. 88, 107 (1976); *In Re Griffiths*, 413 U.S. 717, 718-722 (1973) (tracing history of the Court's treatment of alien restrictions and doctrinal changes); M. Konvitz, *The Alien and the Asiatic in American Law*, (1946).

This issue presents an important question of federal law which potentially impacts several million aliens living and working in the United States. The dilemmas faced by this society in admitting and integrating its immigrant population dominate many aspects of government decision making today. This case represents but one aspect of that web of critical legal issues of constitutional magnitude concerning alienage which this Court has consistently viewed as important to resolve since its decision in *Graham*, 403 U.S. 365.

The Georgia Act's discriminatory classification scheme is reflected in the workers' compensation laws of many other states, which included similar alienage-based classifications in the original legislative enactments of their respective workers' compensation laws passed in the first two decades of this century. In reviewing the constitutionality of these statutes, the highest courts of six states have ruled in a divided fashion. The Georgia Supreme Court and the Supreme Courts of New Mexico, Arizona and Utah have resolved this question to uphold the statute, while the Supreme Courts of Florida and Kansas have most recently expressly held such provisions to be unconstitutional. These decisions on the legal questions raised by the instant case bespeak both the significance of the issues presented as well as the need for the Court's grant of the writ to clarify and render uniform the appropriate, controlling constitutional principles to be applied.

For these compelling reasons, the Court should grant the Petition and vacate the judgment below.

II. THE GEORGIA STATUTE VIOLATES THE EQUAL PROTECTION CLAUSE BY IMPERMISSIBLY DISCRIMINATING ON THE BASIS OF ALIENAGE.

A. THE GEORGIA SUPREME COURT IMPROPERLY FAILED TO FOCUS ITS CONSTITUTIONAL ANALYSIS ON THE RESIDENT ALIEN WORKER WHO HAS BEEN DEPRIVED OF WORKERS' COMPENSATION PROTECTION FOR HIS FAMILY.

The Georgia Supreme Court erred by narrowly focusing its constitutional analysis of O.C.G.A. § 34-9-265(b)(5) on the independent legal rights of the non-resident alien dependents of the deceased wage earner. Determining

that the legal right to receipt of benefits vests solely in the worker's dependents after the death of the worker, the Court next concluded that such dependents did not come within the coverage of the Fourteenth Amendment, as they resided outside the territorial jurisdiction of the United States. App. 6A. In this manner, the Court sustained against constitutional challenge a blatantly discriminatory statutory provision which restricted the workers' compensation insurance coverage of resident aliens who die leaving non-resident alien dependents.

This Court's landmark equal protection cases in the social insurance arena demonstrate the critical flaw in the Georgia Supreme Court's decision. *E.g., Wengler,* 446 U.S. 142; *Califano v. Goldfarb,* 430 U.S. 199 (1977); *Wiesenfeld,* 420 U.S. 636. The Court's precedents establish that the focus of the equal protection analysis in this case must be centered on the rights of the resident alien workers who are denied under the Georgia statute the broad scope of insurance coverage for their dependent family members which is enjoyed by their American and Canadian co-workers. This treatment is wholly consistent with the Court's decision in *Madera,* where this Court upheld a state workers' compensation statute mandating the payment of death benefits to non-resident alien dependents against a Fourteenth Amendment due process challenge *precisely based on its refusal to divide the rights of covered workers under the Act from those of their beneficiaries. Madera,* 262 U.S. at 504.

Wiesenfeld, Goldfarb, and *Wengler* addressed statutory classification schemes which awarded more restricted insurance benefits to male dependents of deceased female wage earners than to female dependents of deceased male wage earners. In each of these cases, the Court's decision analyzed this disparate scheme of benefits as "discrimination against the covered wage earning female." *Goldfarb,* 430 U.S. at 207. The Court expressly held that such classification schemes operate "to deprive

women of protection for their families which men receive as a result of their employment." *Wiesenfeld*, 420 U.S. at 645.

The key to the Court's constitutional analysis has been that such statutes discriminate by granting female workers less potential insurance protection for their dependent family members than male wage earners, despite the workers' equal labors and economic contributions to the society.

Thus, in *Wengler*, 446 U.S. 142, the Supreme Court held unconstitutional the Missouri workers' compensation statute which mandated different standards for the award of death benefits to the dependents of female as opposed to male workers. The female wage earner constituted the focal point of the Court's equal protection analysis:

> The benefits, therefore, that the working woman can expect to be paid to her spouse in the case of her work-related death are less than those payable to the spouse of the deceased male wage earner.
>
> It is this kind of discrimination against working women that our cases have identified and in the circumstances found unjustified.

Id. at 147.

Similarly, in *Goldfarb*, the Court invalidated a provision of the social security laws providing more restrictive terms of survivors' benefits coverage for female employees than male employees. *Goldfarb*, 430 U.S. at 208. *See also, Wiesenfeld*, 420 U.S. at 645 ("[t]he Constitution . . . forbids the gender-based differentiation that results in the efforts of female workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men"); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973); *Id.* at 691 (Powell, J., concurring in judgment); *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 682, n.22 (1983).

Wiesenfeld, Goldfarb, and *Wengler* expressly rejected the position (used by the Georgia Supreme Court in the instant case) that the focus of equal protection analysis should be on the rights of the dependent beneficiaries as opposed to the covered wage earner. As the Court summarized in *Goldfarb:*

> *Weinberger v. Wiesenfeld* rejected the virtually identical argument when appellant's predecessor argued that the statutory classification there attacked should be regarded from the perspective of the prospective beneficiary and not from that of the covered wage earner . . . *The Court, however, analyzed the classification from the perspective of the wage earner and concluded that the classification was unconstitutional because* "benefits must be distributed according to classifications which do not without sufficient justification differentiate among covered employees solely on the basis of sex." 420 US at 647, 43 L Ed 2d 514, 95 S Ct 1225. Thus contrary to appellant's insistence . . . *Wiesenfeld* is "dispositive here."

Goldfarb, 430 U.S. at 207 (emphasis added). *See also, Wengler,* 446 U.S. at 153, n.6.

By erroneously confining its initial analysis to the question of which individuals possess the ultimate right of recovery of death benefits under state law, the Georgia Supreme Court's decision in this case effected an "end run" around settled equal protection doctrine to save an archaic and discriminatory statutory provision.[1] However, federal constitutional principles, as opposed to state

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[1] By focusing exclusively on the rights of the non-resident alien dependents, the Court avoided the equal protection analysis, holding that such individuals were beyond the protection of the Equal Protection Clause. However, unlike the hostile enemy decision reached in distinguishable circumstances in *Johnson v. Eisentrager,* 339 U.S. 763 (1950), this Court has held

law, determine the application and construction of the Equal Protection Clause of the Fourteenth Amendment. *E.g., Wengler,* 446 U.S. 142; *Nyquist v. Mauclet,* 432 U.S. at 7-12; *Sugarman v. Dougall,* 413 U.S. 634, 641-645 (1973); *Graham v. Richardson,* 403 U.S. at 374-376. *Cf., Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1, 39 (1976) (federal constitutional law determines whether state governmental procedures and interests give rise to legitimate claims of entitlement protected under the Fourteenth Amendment); *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 641 (1985) (individual's right to due process with respect to state property interests is determined as a matter of federal constitutional law and cannot be "diminished by the fact that the State may have specified its own procedures that it may deem adequate").

Where a federal question is presented, the mere fact that a state court interprets state law to avoid or defeat the constitutional claim will not preclude federal constitutional review. State law cannot be semantically parsed so as to avoid the application of the Equal Protection Clause to a statutory classification scheme resulting in such a fundamental disparity in employees' workers' compensation coverage, clearly tied to the alienage of the employees and their families. As Justice Blackmun wrote in *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982), it is not enough for a court to interpret legislative intent. "*This Court still has an obligation to view the classificatory system,* in an effort to determine whether the disparate treatment accorded the affected classes is arbitrary." *Id.* at 441 (emphasis added) (Blackmun, J., concurring).

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that the reach of the Equal Protection Clause extends to persons "subject to the laws of a State." *Plyler v. Doe,* 457 U.S. 202, 215 (1982). It is an open question whether the Equal Protection Clause applies to non-resident aliens subject to the laws of a state, although authority exists to support this position. *E.g., Alegria v. United States,* 945 F.2d 1523 (11th Cir. 1991).

In contrast to the Georgia Supreme Court's decision, this Court's decision in *Madera*, 262 U.S. 499 ~~—one of the~~ Court's earliest cases reviewing the constitutionality of a state workers' compensation law – treated the law's classification system as a *unitary system* of benefits based upon coverage of the deceased worker. The Court focused on the universal principles on which workers' compensation statutes operate to find that the purpose of these statutes was always compensation for the employee's injuries, even where payment is made to dependents.

> Provision is universally made in workmen's compensation acts for compensation not only to disabled employees but to the dependents of those whose injuries are fatal. And *the two kinds of payments are "always regarded as component parts of a single system of rights and liabilities arising out of" the relation of employer and employee. Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 414, 156 Pac. 491 Ann. Cas. 1917E, 390. The object of such acts "is single – to provide for the liability of the employer to make compensation for injuries received by an employee," whether to the employee himself or to those who suffer pecuniary loss by reason of his death. *Huyett v. Pennsylvania Railroad*, 86 N.J. Law, 683, 684, 92 Atl. 58.

Id. at 501 (emphasis added).

The Court expressly refused to examine the constitutionality of workers' compensation statutes by referring separately to the rights of employees and their dependents. *"These acts were sustained, in their entirety, without any separate reference to the status of the dependents." Madera*, 262 U.S. at 502 (emphasis added).

Further, the Court made clear that the purpose of workers' compensation statutes is to benefit employees, regardless of whether the benefits are actually paid to the

disabled employee or to his or her dependent survivors, and regardless of where those dependents may reside:

> Such employers' liability statutes are designed to benefit all employees. . . . [T]he action is given to the beneficiaries on their account and they are not intended to be less protected if their beneficiaries happen to live abroad . . . .
>
> "Many of these toilers in mines, on public works, railroads and the numberless fields of manual labor, receive a moderate wage and are compelled to leave in foreign lands those who are dependent upon them and for whose support they patiently work on, indulging the hope that ultimately they may bring to these shores a mother, or wife and children. . . . *The statute not only benefits the survivors, but protects the laboring man . . .* "

Madera, 262 U.S. at 503-504 (citations omitted) (emphasis added).

Madera's treatment of workers' compensation as a unitary system of compensation extending an umbrella of insurance coverage for the employee and his family is thus completely consistent with *Wengler*'s focus on the female employee denied equal coverage for her dependents under Missouri's workers' compensation statute. The Georgia Supreme Court expressly rejected this analysis in the instant case, leaping over the obvious punitive impact of a statutory classification scheme which deprives resident aliens of coverage for their non-resident beneficiaries while granting benefits to their American and Canadian co-workers.

B. AS A STATUTORY CLASSIFICATION BASED ON ALIENAGE, O.C.G.A. § 34-9-265(b)(5) MUST BE REVIEWED BASED ON THE "STRICT SCRUTINY" STANDARD OF CONSTITUTIONAL REVIEW.

"[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate." *Graham v. Richardson*, 403 U.S. at 372-373. Justice Blackmun's concurring opinion in *Toll v. Moreno*, 458 U.S. 1 (1982), elucidated the reasoning underlying such heightened judicial solicitude:

> In combination, these factors – disparate treatment accorded a class of "similarly circumstanced" persons who historically have been disabled by the prejudice of the majority – led the Court to conclude that alienage classifications "in themselves supply a reason to infer antipathy," *Personnel Administrator of Massachusetts v. Feeney*, 442 US 256, 272, 60 L Ed 2d 870, 99 S Ct 2282 (1979) and therefore demand close judicial scrutiny. This understanding, which is at the heart of the Court's modern alienage decisions, was unreservedly reaffirmed this Term in *Cabell v. Chavez-Salido*, 454 US, at 438, 70 L Ed 2d 677, 102 S Ct 735 ("citizenship is not a relevant ground for the distribution of economic benefits").

Id. at 21 (Blackmun, J., concurring).

Laws containing alienage classifications are therefore subject to "strict scrutiny" review. *Graham*, 403 U.S. at 376; *Bernal v. Fainter*, 467 U.S. 216, 219 (1984). "In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available." *Id.* at 219.

O.C.G.A. §34-9-265(b)(5) establishes a classification which clearly discriminates on the basis of the alienage of the employee's dependents and not on the basis of residence or other neutral factors. As the Kansas Supreme Court succinctly held in *Jurado v. Popejoy Construction Co.*, 853 P.2d 669 (1993), in striking down a comparable death benefits provision:

> Although the benefit limitation applies only to dependents who are nonresident aliens, to suggest that this makes it a classification based on residence is disingenuous. Nonresident United States citizens are entitled to the same benefits as resident citizens and resident aliens. *The statute's disparate treatment of these two classes of nonresidents is solely based on alienage.* Simply because the statute does not similarly discriminate against resident aliens does not make it any less an alienage classification.

Id. at 675 (emphasis added).

In *Nyquist*, 432 U.S. at 8-9, this Court ruled that a statute will be subjected to heightened scrutiny regardless of "the fact that the statute is not an absolute bar" to an award of benefits based on alienage, where the statute "served to discriminate only within the class of aliens." Just as the Kansas Supreme Court found with respect to its comparable state provision, O.C.G.A. §34-9-265(b)(5) "creates and treats differently a class of employees based on the alienage of the employees' dependents; it is a legislative classification based on alienage." *Jurado*, 853 P.2d at 675.

This large class of legal resident alien workers, which included Jose Morales, is penalized by working – often in the most disfavored or dangerous jobs in our society – under a law mandating discriminatory terms of workers' compensation insurance coverage for the value of their very lives.

The Court has applied strict scrutiny to strike down on equal protection grounds a range of state laws involving statutory classifications which discriminate on the basis of alienage. *E.g., Graham*, 403 U.S. 365 (conditioning the payment of welfare benefits to resident aliens on a durational residence requirement); *Bernal*, 467 U.S. 216 (alienage bar on notaries public); *Nyquist*, 432 U.S. 1 (state restriction on the receipt of state financial assistance for higher education by a sub-class of resident aliens); *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976) (excluding aliens from the practice of engineering); *Sugarman*, 411 U.S. 634 (aliens barred from employment civil service permanent positions); *In Re Griffiths*, 413 U.S. 717 (excluding aliens from eligibility in the State Bar). *See also, Hampton v. Mow Sun Wong*, 426 U.S. 88.

The two narrow categories of cases which do not fall within the rule that discrimination based on alienage triggers strict scrutiny are wholly inapplicable to the instant case. First, the "political function" exception pertains to state statutes "that exclude aliens from positions intimately related to the process of democratic self-government." *Bernal*, 467 U.S. at 220. The second category of cases arises in the context of Congress's exclusive authority over naturalization and immigration policy which "dictate[s] a narrow standard of review of decisions made by the Congress or President in the area of naturalization and immigration." *Matthews v. Diaz*, 426 U.S. 67, 81-82 (1976). Thus, Congress, and not the states, may constitutionally enact legislation which distinguishes between the benefits and rights of aliens and citizens.

C. GEORGIA'S DISCRIMINATORY DEATH BENEFIT PROVISION FAILS TO SATISFY EQUAL PROTECTION ANALYSIS UNDER STRICT SCRUTINY OR UNDER A RATIONAL RELATIONSHIP TEST.

It is clear that Georgia's discriminatory limit on death benefits payable to workers based on the alienage of their families cannot survive equal protection review under strict scrutiny and cannot satisfy even the minimal requirements of the rational relationship test. As demonstrated below, the statute is irrational, meets no legitimate governmental interest, and is simultaneously both over and under inclusive in drawing its classification scheme.

While Georgia maintains no legislative history for its statutes, and no rationale for this classification scheme has been proffered by the State, a review of the arguments proffered by proponents of death benefits provisions which severely limit or deny recovery to the families of aliens killed in the course of their employment demonstrates that the strictures of equal protection analysis are not satisfied here.

1. There is No Rational Basis for Discriminating Between the Two Countries With Which This Nation Shares its Borders.

It is difficult to imagine any justification for the fact that Georgia's death benefit provision for workers' compensation insurance, which prohibits any recovery in excess of $1,000 by the non-resident families of alien workers killed on the job, exempts aliens who are citizens or residents of Canada. However, even more surprising is the fact that this is a common exception found among state workers' compensation laws, dating from when they were originally enacted. The only case to analyze this exception under the Equal Protection Clause found it to

be patently illegal. In finding that the provision failed to satisfy even the minimal requirements of the rational basis test, the Supreme Court of Florida stated:

> The $100,000 insurance benefit that is unavailable to petitioners in this instance is available to Canadian workers, even in cases where those workers are in this country illegally. What possible state purpose would justify giving a benefit to nonresident Canadians that it denied Mexicans? . . . However, we can discern no rational basis for the distinction drawn between the northern border and the southern one by this statute.

De Ayala v. Florida Farm Bureau Casualty Insurance Co., 543 So.2d 204, 207 (Fla. 1989). The dissenting opinion of Justice Benham in the Georgia Supreme Court opinion in *Morales*, likewise concluded:

> What we have in this controversy are two similarly situated hemispheric neighbors, Canada and Mexico, with dissimilar treatment of their citizens. . . . I find no justification for that distinction.
>
> Through the statutory scheme approved by the majority in this case, resident alien workers of Mexican citizenship who have nonresident families must wear a badge of inferiority.

Morales, App. 11A-13A (Benham, J., dissenting).

The irrationality of the statute is underlined by the fact that if Jose Morales' family had violated the immigration and naturalization laws of this country and resided with him illegally in this country at the time of his death, they would have received the full protection of the law. *See, De Ayala*, 543 So.2d at 207. *Cf., Plyler v. Doe*, 457 U.S. 202.

The legislation exempts citizens of the United States and Canada (*wherever* their dependents may reside), and

Canadian residents (of whatever nation they may be citizens) from the $1,000 limit on death benefits, and allows them a full recovery. Thus, it is untenable to argue that the statute is rational because it is intended to provide death benefits only to persons who might otherwise become public charges, dependent on the state for support when their breadwinner is killed at work. American and Canadian citizens living abroad, and persons of any nationality residing in Canada, are fully compensated under Georgia's statutory scheme, yet will not become charges dependent on an American state.

The argument must also fail that a $1,000 benefit is "rational" to compensate for the value of a life of a man or woman because the "cost of living" is presumed to be lower outside of this country. First, such a statement is unsupported by modern cost of living standards. Second, it ignores the fact that the supposedly diminished cost of living abroad is the same whether the dependent is an American or Canadian citizen, as opposed to the citizen of some other country. Yet, the former receive a fully compensable benefit, while all others receive a pittance.

2. "Administrative Ease" Cannot Justify the Discrimination Effected by this Provision.

In *Jalifi v. Industrial Commission of Arizona*, 644 P.2d 1319, 1322 (Ariz. 1982), the Arizona Supreme Court accepted (without any evidentiary showing) that the statutory limit on death benefits was justified by difficulties of proof and continuing administration arising because the dependents lived outside of the United States. However, such justification must fail in light of well established precedent of this Court:

> [A]lthough efficacious administration of government programs is not without some importance, the Constitution recognizes higher values than

> speed and efficiency. . . . And when we enter the realm of "strict judicial scrutiny," there can be no doubt that "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality.

Frontiero v. Richardson, 411 U.S. at 690 (requirement that servicewoman's application for increased quarter's allowance and health benefits for husband be supported by showing that he was dependent upon her for more than one-half of his support, where servicemen required to make no such showing for wives, held unconstitutional). *See also, Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. at 152 (rejecting administrative convenience justification for discriminatory proof of dependency provision in Missouri workers' compensation law).

Indeed, since the burden of proof to come forward, make a claim and demonstrate eligibility through dependency falls upon the family of the deceased worker, it is inconceivable how this creates an increased burden, administrative or otherwise, upon the state. Nor does such a burden fall to the employer or the insurer. O.C.G.A. §34-9-13. *See, Argonaut Insurance Co. v. King*, 127 Ga. App. 566, 567 (1972); *Glenn Falls Indemnity Co. v. Jordan*, 56 Ga. App. 449 (1937). Furthermore, since citizens of the United States and Canada are not excluded from receiving benefits, *regardless of whether they reside in another foreign country* where such burdens of administration would be identical, this argument cannot stand.

The Georgia statute, like the statute struck down in Kansas, imposes a burden on the employer or insurer to pay a minimal sum to the survivors. In dismissing the "administrative difficulty" argument, the Kansas Supreme Court held that the threshold burden of establishing dependency as a question of fact and of distributing the "death benefit" to persons outside the country would exist notwithstanding the fact that the benefit paid was a paltry sum. *Jurado*, 853 P.2d at 677. "Finally, the

contention that administration of benefits would be an 'insurmountable task' may have been viable in 1911 [when this provision was enacted]. However, given the global economy within which we work, the task has become less difficult over the past 80 years." *Id.*

3. The Statute Cannot Be Justified on the Basis of Cost to the Employer or Insurer.

This provision cannot be justified as bearing any relationship to the cost to an employer or insurer of providing workers' compensation coverage to employees. Indeed, under Georgia's current regulatory system, when an alien is killed on the job and is survived only by dependents outside the U.S. or Canada, what results from the $1,000 death benefit cap is nothing but a windfall to the employer or insurance company.

First, the residence of employee dependents plays absolutely no role in the setting of premiums for workers' compensation insurance. Premiums are determined by ratings for individual jobs issued by licensed ratings corporations. O.C.G.A. §33-9-12. A premium rate is established for each job category based on consideration of danger and risk of injury. These rates are applied to the payroll amounts paid by employers for each such job category. O.C.G.A. §33-9-21(a)(2). The nationality of employees or the residence of their dependents is absolutely irrelevant to the setting of this premium payment. *Id.* Hence, the resulting reduction in death benefits when an alien is killed and is survived by family abroad – the money not sent to the worker's family – accrues as profit to the insurance company.

Second, if an employee dies without any dependents whatever, O.C.G.A. §34-9-358(a) provides that the employer or insurer must pay either one-half of the death benefits which would have been due if dependents had existed, or the sum of $10,000.00 (whichever is less) to a

common benefit pool (unrelated to death benefits) called the Subsequent Injury Trust Fund. Thus, an employer is economically ten times better off if an employee killed at work leaves dependents living outside the U.S. or Canada rather than leaving no dependents whatsoever.

The net effect of such irrational and unjustifiable discrimination is to create

> a 'throw-away' class of workers. . . . [E]mployers may with impunity derive considerable savings by skimping on safety precautions because it will be more economical to hire Mexican nationals with nonresident families for the most hazardous jobs, and let them die, than it would be to institute proper safety procedures. Such a result is totally at odds with the intent of the Workers' Compensation Act.

Morales, App. 13A (Benham, J., dissenting). *See also, De Ayala*, 543 So.2d at 207 n.7.

4. The Statutory Limit of $1,000 on Death Benefits for Alien Workers is an Anachronism Which Has Remained for 73 Years, While Death Benefits for All Other Workers Have Consistently Increased Over the Years.

In Georgia, the Workers' Compensation Act first passed in 1920 provided the present day $1,000 limit on recovery of death benefits for workers survived by nonresident aliens outside the U.S. and Canada, and has never been amended. In contrast, the 1920 statute provided a death benefit of $4,000 for all other workers and has been amended eleven times in the intervening 73 years, increasing benefits in 1920, 1922, 1939, 1955, 1963, 1968, 1973, 1974, 1975, 1985 and 1992 to current levels which provide benefits of up to $250 per week throughout the period of dependency. O.C.G.A. §34-9-261. While the statute caps the benefits for a worker survived only

by a dependent spouse to a maximum of $100,000 as of July 1, 1992 (O.C.G.A. §34-9-265(d)), benefits up to $250 per week continue for children through the age of majority or graduation from high school (whichever occurs later) so that these benefits could equal $234,000 over 18 years; or if the child attends college full-time, through age 22, totalling $286,000 over 22 years; or if disabled from working, the child could recover a lifetime of benefits totalling $845,000 through age 65. *See, Jurado,* 853 P.2d at 676-677.

No justification can support the crushing disparity of such inequity as it has evolved over the years.

5. The Purpose of Workers' Compensation Insurance is to Provide a Quid Pro Quo to Employees Sacrificing their Common Law Remedies for a Uniform System of Benefits Available in the Case of Injury or Death on the Job.

The major purpose for enactment of workers' compensation statutes throughout the nation was to insure that the cost of injury or death to workers would be compensated to the employee, without regard to negligence, through the payment of disability compensation, medical expenses, rehabilitation services, and death benefits. *E.g., Madera,* 262 U.S. 499. There is no question that the insurance coverage provided through these statutes comprises part of the benefits an employee automatically receives in accepting employment.

Part of the justification for enacting these laws was to ease the difficulty of recovery through the traditional common law tort system for individuals injured or killed in the course of their employment. The benefits accorded under the statutes were a *quid pro quo* for the sacrifice of common law remedies which were deemed to be barred by the availability of a recovery under workers' compensation. These statutory remedies became the exclusive

remedy for workers hurt on the job. *E.g., Jurado,* 853 P.2d at 674-675.

Thus a property interest is vested in the employee and he or she is legally entitled to a reasonable recovery in consideration of the sacrifice of common law remedies in tort and for wrongful death. This interest is deprived without due process when an employee is barred from exercising his or her common law rights of recovery against an employer for a death on the job in consideration of the payment of the sum of $1,000. *Cf., Pedrazza v. Sid Fleming Contractor, Inc.,* 607 P.2d 597, 601 (N.M. 1980) (non-resident alien dependents barred from any recovery of death benefits under the workers' compensation act are not precluded from using other legal remedies to recover for the injury and death of the worker). *See also, De Ayala,* 543 So.2d at 207.

Thus, it is clear for a myriad of reasons that this statutory alienage discrimination cannot withstand the test of strict scrutiny under the equal protection clause, and further could not satisfy even the minimal requirements of the rational relationship test. It should be declared unconstitutional.

D. CERTIORARI SHOULD BE GRANTED AS THE STATES ARE DIVIDED IN ANALYZING THE CONSTITUTIONALITY OF DEATH BENEFIT PROVISIONS WHICH DISCRIMINATE AGAINST EMPLOYEES SURVIVED BY NON-RESIDENT ALIEN DEPENDENTS.

Since 1980, six states have been confronted with constitutional challenges to state workers' compensation schemes which deprive alien dependents who reside outside of this country of death benefits comparable to those permitted the dependents of citizens. Each of these cases

has grappled with the equal protection argument presented here. Still other state workers' compensation statutes carry similarly discriminatory schemes. Review of this constitutional issue is important to resolve this important federal question in a manner which is uniform across state lines.

Most recently, the Supreme Court of Kansas held that a statutory ban on recovery of more than $750 to non-resident alien dependents of workers killed on the job violated the federal and state guarantees of equal protection. *Jurado,* 853 P.2d 669. The court held that determination of the constitutionality of the provision turned on consideration of the rights of the worker, and not those of his dependents. The court determined that although strict scrutiny applied to this classification based on alienage, the reasons advanced to support the statute failed to satisfy even the rational basis test.

Jurado followed another recent decision by the Supreme Court of Florida in *De Ayala,* 543 So.2d 204. In striking down the statute, the Florida court similarly held that the constitutional focus must be on the rights of the deceased worker, and not on his survivors. *Id.* at 206. As such, the court held that the Florida statute which limited the recovery of death benefits to $1,000 by all non-resident aliens (except those who resided in Canada) while all other persons received a maximum of $100,000 violated the equal protection rights of the worker. The court held that the statute survived neither strict scrutiny analysis based upon alienage, nor rational basis review. *Id.* at 207.

Three earlier cases had upheld the constitutionality of discriminatory death benefit provisions against equal protection challenge, each focusing on the rights of the dependents, and not of the deceased worker. *See, Alvarez Martinez v. Industrial Commission of Utah,* 720 P.2d 416 (Utah 1986); *Pedrazza,* 607 P.2d 597; *Jalifi,* 644 P.2d 1319. In *Jalifi* the court refused to hold that the equal protection

clause was inapplicable to evaluating the rights of the alien dependents, finding that the "petitioner is conferred some benefits by the Arizona State Legislature, which may provide the requisite nexus to bring her within the purview of the equal protection clause." *Id.* at 1321 n.2. Nonetheless, the court upheld the provision limiting a non-resident alien dependent's recovery of death benefits to 60% of those otherwise available by law.[2]

This split in the decisions of the courts of last resort for six states on an important constitutional question justifies the grant of certiorari here to create uniformity on an important federal question.

III. O.C.G.A. §34-9-265(b)(5) IS INVALID UNDER THE SUPREMACY CLAUSE BECAUSE IT IMPOSES A DISCRIMINATORY BURDEN UPON ALIENS LAWFULLY WITHIN THE UNITED STATES AND CONFLICTS WITH CONGRESS'S EXCLUSIVE CONSTITUTIONAL AUTHORITY TO REGULATE IMMIGRATION AND NATURALIZATION.

The federal government is vested with broad and comprehensive powers over the admission of aliens derived from the Constitution's specific grants of exclusive authority over naturalization and foreign relations. U.S. Constitution, Art. I, §8, cl 3 and 4; *Toll v. Moreno*, 458 U.S. 571-572; *Graham v. Richardson*, 403 U.S. at 376-383; *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 419

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[2] Arguably, Georgia's restrictive statutory scheme is the most onerous of all of the state laws reviewed. While Arizona limited death benefits to 60% of the statutory maximum otherwise provided (*Jalifi*), and Utah used a 50% cap (*Alvarez*), Georgia's statute limits recovery to $1,000. Although New Mexico allowed no recovery to persons residing outside of this country, the court refused to bar a tort action by the family to recover for the wrongful death. *Pedrazza*, 607 P. 2d at 601.

(1948). "State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration and have accordingly been held invalid." *Id.* at 419.

State laws that impose burdens upon residence linked to alienage which are not authorized by or consistent with federal law have been repeatedly held unconstitutional. "Read together, *Takahashi* and *Graham* stand for the broad principle that 'state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress.' " *Toll*, 458 U.S. at 12. (citations omitted). As this Court held in *Takahashi*, invalidating a state law precluding citizens ineligible for citizenship under federal law from obtaining fishing licenses: The Fourteenth Amendment and civil rights laws promulgated thereunder "embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." *Takahashi*, 334 U.S. at 419-420.

A wide range of state statutes denying such "equality of legal privileges" have been declared violative of the Supremacy Clause. *E.g.*, *Toll*, 458 U.S. 1 (state university financial aid regulation denying "in-state" preferential financial aid status to a class of nonimmigrant aliens); *Graham*, 403 U.S. at 376-383 (durational residence condition on aliens' receipt of welfare benefits) and cases cited therein; *Truax v. Raich*, 239 U.S. 33 (1915).

In the instant case, O.C.G.A. §34-9-265(b)(5) imposes a severe and punitive burden on the terms of residence for alien workers lawfully in this country who have nonresident alien dependents. This burden rendered Jose Morales' daily labors for Barge-Wagener Construction

Company, not to mention his life, effectively valueless upon his death, when compared to the treatment of his fellow workers. The statute's imposition of such unequal terms and conditions of employment based upon alienage is neither authorized by nor consistent with federal law and therefore must be declared invalid under the Supremacy Clause.

IV. CONCLUSION

While twentieth century history might imply that America has a longstanding record of discrimination against aliens, it is in fact a relatively modern phenomenon. Indeed, a longer view of our history instructs that aliens were not only spared the discriminatory exclusion policies that characterized the early part of this century, but were traditionally accorded most of the incidents of citizenship until the late nineteenth century. *E.g.*, *The Alien and the Asiatic in American Law*, 1 (1946); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 107 & n.30.

It is hardly novel to urge that the protection of the Fourteenth Amendment must be applied in light of evolving standards of decency in this society. This country's long struggle with racism and discrimination on the basis of alienage are certainly hallmarks of those evolving standards. *In Re Griffiths*, 413 U.S. at 719-720. Thus, it is with a skeptical eye that the Court must view the anachronism of workers' compensation laws enacted at the turn of the century which continue to discriminate grievously against workers killed in the course of their employment today. Georgia's discriminatory statute fundamentally violates the Fourteenth Amendment's equal protection mandate as applied by this Court's precedents.

The petition should be granted and the judgment of the Georgia Supreme Court reversed.

Dated: Atlanta, Georgia, September 16, 1993.

Respectfully submitted,

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SUPREME COURT OF GEORGIA

ATLANTA JUNE 18, 1993

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S93A0252

BARGE-WAGENER CONSTRUCTION COMPANY ET AL. V. JOSE ANTONIO MORALES ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Benham and Sears-Collins, JJ., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Sherie M. Welch, Clerk.

In the Supreme Court of Georgia

Decided: May 24 1993

S93A0252. BARGE-WAGENER CONSTRUCTION COMPANY et al. v. MORALES et al.

CLARKE, Chief Justice.

Jose Morales was employed as a construction worker by Appellant Barge-Wagener when he fell to his death from a building on which he was working. His wife and two minor children survive him. They are citizens of Mexico and reside in that nation.

The State Board of Workers' Compensation ("Board") granted $1,000 in benefits to Mr. Morales' widow and minor children as required under O.C.G.A. § 34-9-265(b)(5).[1] The beneficiaries appealed the decision to the superior court alleging that the statute violates the equal protection clause of the Georgia Constitution. The superior court reversed the decision of the Board. Looking to a Florida Supreme Court's invalidation of a nearly identical Florida statute, the superior court held that alienage is a suspect classification. The court went on to hold that the statute could not withstand the requirements of strict scrutiny under the equal protection clause.

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[1] This section reads:

(b) If death results instantly from an accident arising out of and in the course of employment . . . the compensation under this chapter shall be as follows:

. . .

(5) If the employee leaves dependents who are not citizens or residents of the United States or the Dominion of Canada at the time of the accident, the amount of compensation shall not in any case exceed $1,000.00.

Barge-Wagener and its insurer, Argonaut Insurance Company, filed an application for discretionary appeal. We granted the application and now reverse.

This case raises two issues. First, whose rights are at stake, the decedent worker's or the nonresident dependents'? Second, does O.C.G.A. § 34-9-265(b)(5) violate the pertinent party's rights under the Georgia Constitution?

1. The first step of our inquiry is to decide in whom the workers' compensation benefits are vested. Our analysis begins with an examination of the statute. Upon the death of an employee, the employer must pay benefits to the employee's dependents under O.C.G.A. § 34-9-265. Two types of benefits are payable after the death of the employee. The employer must "pay the reasonable expenses of the employee's last sickness and burial expenses not to exceed $5,000. If the employee leaves no dependents, this shall be the only compensation." O.C.G.A. § 34-9-265(b)(1). In addition, the employer must pay to the employee's dependents a portion of "a weekly compensation which is provided for in Code Section 34-9-261." O.C.G.A. § 34-9-265(b)(2).

Death benefits under workers' compensation statutes are separate and distinct from the right to compensation vested in the employee by reason of injury. *See International Mercantile Marine Co. v. Lowe*, 93 F.2d 663, 115 A.L.R. 896 (2d Cir.), *cert. denied*, 304 U.S. 565 (1938). Death benefits do not become part of the estate of the deceased, and are not liable for his debts, "but is the exclusive property of the beneficiaries." 82 Am. Jur.2d, *Workers' Compensation* § 187, at 184 (1992). The death benefits are intended to compensate the beneficiaries for their injury,

which is the loss of support resulting form [sic] the death of the deceased worker. This is not merely the survival of the rights of the deceased; the rights to death benefits do not accrue until the death of the worker.

In this respect, the workers' compensation scheme is analogous to the right of recovery under the wrongful death statute, O.C.G.A. §§ 51-4-2 and 51-4-3. Although based on an actionable tort upon the decedent, this statutorily created action is not a property right of the decedent's estate. *Boggan v. Boggan*, 145 Ga. App. 401, 401 (243 SE2d 664) (1978). The wrongful death action, like death benefits under workers' compensation, are rights vested in the surviving family. *Dixon v. Ross*, 94 Ga. App. 187, 188 (94 SE2d 86) (1956).

The sickness and burial expenses are not like death benefits; they are for the benefit of the decedent's estate. As such, these payments are a property right of the decedent employee.

Given the provisions of the statute, we find that the legislature intended the rights to death benefits to vest in the dependents while making the burial expenses recoverable by the decedent's estate. We conclude that the dependents must assert their own rights to the benefits and cannot rely on the constitutional status of the decedent.

2. The second prong of our inquiry applies the equal protection clause to these two sets of property rights.

The equal protection clause of the Georgia Constitution[2] is "substantially equivalent" to the equal protection clause of the fourteenth amendment of the U.S. Constitution[3]. *McDaniel v. Thomas*, 248 Ga. 632, 638 (285 SE2d 156) (1981); *Suber v. Bulloch County Bd. of Educ.*, 722 FSupp 736 (S.D. Ga. 1989). O.C.G.A. § 34-9-265 clearly discriminates between U.S. and Canadian citizens and residents on the one hand and all other nonresident aliens on the other. The question, however, is whether the discrimination is an unlawful one.

Aliens are treated under United States law under an ascending hierarchy of rights and privileges. The U.S. Constitution "expressly accord[s] differing protection to aliens than to citizens." *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (110 SC 1056, 108 LE2d 222) (1990). Resident aliens are entitled to important constitutional rights guaranteed under the equal protection and due process clauses. *Yick Wo v. Hopkins*, 118 U.S. 356 (6SC 1064, 30 LE 220) (1886). The superior court and appellees, however, do not distinguish between aliens within the jurisdiction of the United States and aliens residing outside this country. The United States Supreme Court, however, has been clear that it is the alien's presence within its territorial jurisdiction that gives the Judiciary power to act. *Johnson v. Eisentrager*, 339 U.S. 763, 770-71 (70 SC 936, 94 LE 1255) (1950). We hold that the equal protection clause does not

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[2] "No person shall be denied equal protection of the laws." GA. CONST. art. 1, § 1, ¶ 1.

[3] "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

extend to nonresident aliens and that the Board correctly awarded death benefits under O.C.G.A. § 34-9-265(b)(5).

Aliens outside the borders of the United States are subject to their own nations [sic] laws and cannot invoke the protections reserved for citizens and residents of the United States. O.C.G.A. § 34-9-265(b)(5) surely discriminates against Mr. Morales's family in Mexico, but it is not unlawful. They must settle for what the legislature of this state is willing to provide.

The superior court agreed with the reasoning of the Florida Supreme Court in a case striking down an almost identical statute.[4] *De Ayala v. Florida Farm Bureau Cas. Ins. Co.*, 543 So.2d 204 (Fla. 1989). The decision of the Florida Court rested on the conclusion that the dependents were asserting the rights of the decedent employee. Since the equal protection clause extends to resident aliens, the denial of full death benefits was held unconstitutional. Our decision turns on the finding that the death benefits are the property of the nonresident dependents. As a result, the dependents cannot assert the resident employee's constitutional rights. *See De Ayala, supra* at 208-09 (Overton, J. dissenting).

3. Notwithstanding our holding above, we find that the decedent's estate has the right to reasonable burial expenses under the O.C.G.A. § 34-9-265(b)(1). *See Hartford Accident & Indem. Co. v. Braswell*, 85 Ga. App. 487 (69 SE2d

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[4] The Florida statute is nearly identical to our own statute. FLA. STAT. ANN. ch. 440.016(c)(7). In 1987, however, the Florida legislature increased the amount of compensation from $1,000 to $50,000. 1987 Fla. Laws ch. 87-330 § 4.

385) (1952) (finding that widow acting in capacity of personal representative of the estate may bring action for disability compensation). Burial expenses are to be paid "in addition to any other compensation." O.C.G.A. § 34-9-265(b)(1). Subsections (2) through (5) explain the amounts of dependent benefits that are to be paid subject to whether the dependents are totally or partially dependent on the employee. In the present case, the total dependent "compensation shall not in any case exceed $1,000." O.C.G.A. § 34-9-265(b)(5). Since burial expenses granted under subsection (b)(1) are not compensation for dependents, the employee's estate is entitled to this payment.[5] We find that the workers' compensation benefits to be paid to appellees should also include reasonable burial expenses, up to $5,000.

Constitutional requirements also mandate this result. The state cannot deny burial expenses to the estate of Mr. Morales simply because he is an alien or has dependents who are aliens. Burial expenses are the property of Mr. Morales's estate. The equal protection clause extends to all those within the jurisdiction of the United States. To deny the benefits of burial expenses to Mr. Morales because of his alienage or the alienage of his family is an

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[5] O.C.G.A. § 34-9-265 was first passed in 1920 in essentially the same form in which it now appears. Ga. Laws 1920, p. 188, § 38. While the amount of compensation for burial expenses increased from $100.00 in 1920 to $5,000.00 in 1985, Ga. Laws 1985, p. 727, § 11, the benefits paid to nonresident dependents remained at $1,000.00 Apparently, the legislature intended these sections to be independent payments.

arbitrary exercise of the law in violation of the equal protection clause.[6]

In summary, we find that the limitations on death benefits contained in O.C.G.A. § 34-9-265(b)(5) do not violate the equal protection clause of the Georgia Constitution. The denial of burial expenses to the estate of Mr. Morales, however, is reversed.

Judgment reversed. All the Justices concur, except Benham and Sears-Collins, JJ., who dissent.

In the Supreme Court of Georgia

Decided:

S93A0252. BARGE-WAGENER CONSTRUCTION COMPANY v. MORALES

BENHAM, Justice, dissenting.

This matter is before the court mainly to determine whether OCGA § 34-9-26 (b) (5) violates the Equal Protection Clauses of the Georgia Constitution and the United States Constitution. Turning briefly to the facts, we see that Jose Morales, age 31, was employed as a construction

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[6] There does not appear to be evidence in the record showing whether Mr. Morales is a permanent resident, temporary resident, or U.S. Citizen. However, we need not decide his residency status here. It is sufficient to say that he is entitled to equal protection rights. Denial of his burial benefits based on his status or the status of his relatives is arbitrary and capricious and cannot stand even under a rational basis scrutiny.

worker for appellant on September 19, 1990, when he fell 22 stories to his death. He left as dependents a wife and two small children who reside in Mexico. They filed a claim for Worker's Compensation benefits and were awarded the sum of $1,000 under OCGA § 34-9-265 (b) (5). They appealed that award to the Fulton County Superior Court which found the statute in question to be violative of the Equal Protection Clauses of the Georgia Constitution and the Fourteenth Amendment of the United States Constitution. On this appeal from that decision a majority of this court, relying in part on the opinion of a lone dissenter of the Florida Supreme Court, has determined that there is no equal protection violation. Finding myself in disagreement with that view as expressed in Divisions 1 and 2 of the majority opinion, I must respectfully dissent.

1. In reaching its decision, the majority first, and in a very artful manner, determined that benefits provided under OCGA § 34-9-265 (b) (5) belong to the dependents and not to the employee's estate. In support of that approach, the majority opinion analogized the Workers' Compensation statute to the Wrongful Death statute, concluding that the legislature intended for death benefits under the Workers' Compensation statute to vest exclusively in the dependents as they do under the Wrongful Death statute. Having made those determinations, the majority easily dismissed the claim of an equal protection violation because the nonresident-alien dependents no longer have standing to pursue it. However, the analogy to the Wrongful Death statute is fatally flawed. While the right to recover for the death of a family member in a wrongful death action clearly and properly belongs to the

survivors, the benefits which flow from the workers' compensation system are benefits afforded to the **worker** in exchange for giving up the right to seek redress for injuries suffered on the job. As the Supreme Court of Florida noted, "[o]ne of the primary benefits that an employee works for is the satisfaction and well-being of providing for his or her family." *De Ayala v. Florida Farm Bureau Cas. Ins. Co.*, 543 So2d 204, 207 (Fla 1989). It is painfully ironic that the majority's analysis of this case results in an employee having bargained away a right of action which may have sustained his family after his death in exchange for the right to benefits his family is denied solely because they are not resident in this country.

In considering this matter of standing, we need look no further for guidance than to our sister state of Florida which, in considering the same issue, determined that the dependents were pursuing the rights of the deceased worker and, therefore, that they had standing to challenge the constitutionality of the statutory scheme. In *De Ayala v. Florida Farm Bureau Cas. Ins. Co.*, supra at 206, the Florida Supreme Court held as follows:

> [W]e do not perceive this case as hinging on the constitutional rights of the surviving dependents, but on the constitutional rights of the worker, now deceased. . . . This case concerns whether a worker who happens to have dependents residing out of the country is entitled to the same fruits of his or her labor as any other worker, including the same insurance benefits where the state has required those benefits to be provided. It thus is immaterial that petitioners

> happen to be nonresident aliens, since they have standing in this context as his beneficiaries[.]

We should reach the same conclusion here in Georgia because, as was the case in Florida, the benefits in question were generated by the employee's labor and flowed through him to the intended beneficiaries, his dependents. We should recognize their standing to enforce the rights which Mr. Morales earned by his labor while resident in this country.

2. Having concluded that the nonresident-alien dependents of Mr. Morales have standing to challenge the constitutionality of OCGA § 34-9-26 (b) (5), I now turn to the issue of whether a statutory scheme which provides different benefits to similarly situated persons denies equal protection.

What we have in this controversy are two similarly situated hemispheric neighbors, Canada and Mexico, with dissimilar treatment of their citizens. Resident aliens whose nonresident dependents are Canadian citizens are accorded full rights; resident aliens whose dependents are Mexican citizens are accorded abbreviated rights. Clearly, this is unequal treatment. However, unequal treatment standing alone is not enough to constitute a constitutional violation.

We must determine, therefore, whether this dissimilar treatment rises to the level of constitutional impermissibility. The claim is made that this conduct is violative of the Equal Protection provisions of both the Georgia Constitution and the Fourteenth Amendment of the United States Constitution, which provisions are, as the majority points out, substantial equivalents. Again,

we would do well to heed the words of the Florida Supreme Court:

> In evaluating claims of statutory discrimination, a statute will be regarded as inherently 'suspect' and subject to 'heightened' judicial scrutiny if it impinges too greatly on fundamental constitutional rights flowing either from the federal or [state] constitutions, or if it primarily burdens certain groups that have been the traditional targets of irrational, unfair, and unlawful discrimination. [Cits.]

De Ayala v. Florida Farm Bureau Cas. Ins. Co., supra at 206. On that issue, the decisions of the U.S. Supreme Court

> have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority [cit.] for whom such heightened judicial solicitude is appropriate.

Graham v. Richardson, 403 US 365, 372 (91 SC 1848, 29 LE2d 534) (1971). The Supreme Court went on in *Graham* to note that where a suspect classification is involved, there must [sic] a compelling state interest to justify it. No such compelling interest has been articulated or is present in this case. Here we have a deceased employee who, although not a citizen but a resident alien, paid taxes, contributed to the economic growth of this country, and bore the same burdens as other employees; yet his dependents are denied the fruits of his labor, specifically workers compensation benefits, because they were not residents of this country at the time of his death. At the

same time, Canadians, who are also hemispheric neighbors, are accorded full benefits. I find no justification for that distinction.

Through the statutory scheme approved by the majority in this case, resident alien workers of Mexican citizenship who have nonresident families must wear a badge of inferiority. While we are bound to uphold the laws, we are not bound to do so without giving thought to matters of policy and justice, neither of which would be served by creating a "throw-away" class of workers. Yet, we must recognize that a likely result of the majority's holding in this case is that employers may with impunity derive considerable savings by skimping on safety precautions because it will be more economical to hire Mexican nationals with nonresident families for the most hazardous jobs, and let them die, than it would be to institute proper safety procedures. Such a result is totally at odds with the intent of the Workers' Compensation Act.

For the reasons stated above, I must dissent to the majority's reversal of the trial court's judgment. I am authorized to state that Justice Sears-Collins joins in this dissent.

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JOSE A. MORALES, Deceased/Employee vs. JULIA CORPUS de MORALES, Widow, JUAN ANTONIO MORALES, and DANIEL MORALES, Minor Children, Employer and ARGONAUT INSURANCE COMPANY, Insurer	)	CIVIL ACTION FILE NO. E-03875

ORDER REVERSING THE DECISION OF THE WORKERS' COMPENSATION BOARD

Jose Morales, the decedent, fell 22 stories to his death while employed as a construction worker by Barge-Wagener Construction Company. He is survived by his wife and two minor children, who reside in Mexico. Mr. Morales' death was covered by the Georgia workers' compensation statute.

The State Board of Worker's Compensation ("Board") granted $1,000 in benefits to Mr. Morales' widow and minor children, as set forth in O.C.G.A. § 34-9-265(b)(5). The beneficiaries have appealed that decision.

The issue before this Court is whether the statute which provided these death benefits violated the equal

protection clause of the Fourteenth Amendment and/or the equal protection clause of Art. I, § 1, Par. 2 of the Georgia Constitution as it might relate to the petitioners. Petitioners contend that the Board's decision is incorrect because the statute is unconstitutional on its face and as applied to petitioners. They argue that the statute violates Art. I, § 1, Par. 2 of the Georgia Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The relevant provision of the Workers' Compensation Act, O.C.G.A. § 34-9-265, provides in pertinent part:

> If the employee leaves dependents who are not citizens or residents of the United States *or the Dominion of Canada* at the time of the accident, the amount of compensation shall not in any case exceed $1,000. [Emphasis added.]

Petitioners cite *De Ayala v. Florida Farm Bureau Cas. Inc.*, 543 So.2d 205 (Fla. 1989), in support of their contention that the statute is unconstitutional. The Florida Supreme Court held that a statute substantially similar to the Georgia statute in the instant case was unconstitutional. In *De Ayala*, the Florida statute was challenged on equal protection grounds. That Court reasoned that the case turned upon the constitutional rights of the decedent at the time of his death and that the dependents had standing as beneficiaries of the deceased.

The Florida Court concluded that alienage is a suspect class and thus applied. *De Ayala, supra* at 207. The Florida employer argued there was a valid reason to give preferred treatment to nonresident Canadians over nonresident Mexicans because "the U.S. and Canada share

one of the largest unprotected borders in the entire world." *De Ayala, supra.* That Court could "discern no rational basis for the distinction drawn between the northern border and the southern one by this statute." *De Ayala, supra.*

In Georgia, dependents may not assert the constitutional rights of the deceased worker. They may, however, assert their own rights granted by the statute and protected by both the Georgia and the United States Constitutions.

In the instant case, the respondent urges the Court to follow the Utah and New Mexico Courts which have determined that nonresident aliens are beyond the protection of the equal protection clause because they are not within the state's jurisdiction. In *Pedrazza v. Sid Fleming Contractor, Inc.*, 607 P.2d 597, 600 (N.M. 1980), that Court held:

> The purpose of the equal protection clause is to protect persons and groups within United States jurisdiction from being singled out and subjected to hostile legislation.

In the Arizona case, however, that Court did not go so far as to hold that the equal protection clause does not apply. In fact, the Court stated that "petitioner is conferred some benefits by the Arizona State Legislature, which may provide the requisite nexus to bring her within the purview of the equal protection clause." *Jalifi v. Industrial Comm. of Arizona*, 644 P.2d 1319, 1321 n.2 (Ariz. 1982).

The equal protection provisions in the Georgia Constitution are "substantially equivalent of equal protection of the laws under the U.S. Constitution." *McDaniel v.*

Thomas, 248 Ga. 632, 638 (1981). The Georgia Constitution equal protection clause provides:

> Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws. Ga. Const. Art. I, § 1, Par. 2.

In Georgia, a strict judicial scrutiny standard " . . . is employed when a classification involves socially stigmatic inequalities, such as those based upon race. . . . The governmental classification will fail unless the government demonstrates that the classification is *necessarily* related to a compelling governmental objective. [cit.] Application of the strict scrutiny test means that the classification is not entitled to the usual presumption of validity." *McDaniel v. Thomas*, *supra* at 639, quoting *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973).

O.C.G.A. § 34-9-265 provides death benefits to dependents of workers covered under the Act. The statute confers a benefit commensurate to a property right upon the dependent beneficiaries.

The Georgia Court of Appeals held in *Freeman Decorating Co. v. Subsequent Injury Trust Fund*, 175 Ga. App. 369, 333 S.E.2d 204 (1985), that workers' compensation benefits survived the death of the dependent and awarded the dependent's estate the benefits derived from the employee's death. The majority opinion stated:

> The policy of the Workers' Compensation Act, with respect to the payment of death benefits, is to provide a measure of compensation to persons suffering a direct loss of support because of

> the death of an employee as a result of his employment.

In dissent, one judge criticized the majority holding, writing:

> [a] workers' compensation death benefit, unlike tort compensation, is not a property right which survives in favor of heirs, it is an award designed to protect the dependents from financial insecurity.

While the dissenting judge did not recognize the property right granted by the majority, he did recognize that the award was designed to protect the dependents.

O.C.G.A. § 34-9-265(b)(5) confers upon nonresident aliens the status of dependents entitled to death benefits. The benefits granted by the statute provide a nexus bringing petitioners' claim within the purview of Georgia's equal protection clause. The statute confers these benefits in violation of the Georgia Constitution. The protection granted by O.C.G.A. § 34-9-265(b)(5) is not impartial. The petitioners, nonresident aliens, are being denied equal protection under the Georgia Constitution because they are denied death benefits available to nonresident aliens from Canada.

It is this Court's opinion that the statute at issue violates equal protection. The classification in the statute involves alienage, one of the traditional suspect classes. Therefore, the strict scrutiny standard is employed. In addition, the right impinged is one which the State of Georgia has held commensurate to a property right.

Under the strict scrutiny standard, the statute impinges too greatly upon a fundamental constitutional

right granted under the Georgia Constitution. Under the strict scrutiny analysis, the classification created by the statute must be "structured with precision and . . . tailored narrowly" to serve a *compelling* governmental objective. *McDaniel, supra* at 639.

Because this Court has determined that O.C.G.A. § 34-9-265(b)(5) violates the Georgia Constitution, it is not necessary to reach the merits of petitioners' claim under the United States Constitution.

The decision of the State Board of Workers' Compensation is REVERSED.

The case is remanded to the Board for reconsideration in light of the Court's decision.

SO ORDERED, this 28th day of August, 1992.

/s/ Don A. Langham
DON A. LANGHAM, Judge
Superior Court of Fulton County

LOGO

STATE BOARD OF WORKERS' COMPENSATION

Suite 1000, South Tower
One CNN Center
Atlanta, Georgia 30303-2788

Claim Number: 451-93-5853
Accident Date: September 19, 1990
Case Of: Jose A. Morales, Desd.
Date: June 17, 1992

Jose A. Morales, Deceased	Employee
Julia Corpus de Morales, Widow Juan Antonio Morales and Daniel Morales, Minor Children Post Office Box 89121 Atlanta, Georgia 30312	Claimants
Barge-Wagener, Incorporated 1815 The Exchange Atlanta, Georgia 30339	Employer
Argonaut Insurance Company Post Office Box 720293 Atlanta, Georgia 30358	Insurer
Bonny Berry Wilder Northeast Business Center 5725 Buford Highway, Suite 117 Doraville, Georgia 30340	Counsel for Claimants
Michael Thorpe Two Decatur TownCenter, Suite 520 125 Clairemont Avenue Decatur, Georgia 30030	Counsel for Employer/ Insurer

Subsequent Injury Trust Fund Two Northside 75, Suite 124 Atlanta, Georgia 30318-7784	Party In Interest
Dana E. McDonald 133 Carnegie Way, Suite 508 Atlanta, Georgia 30303	Counsel for S.I.T.F.

This claim is before the Board for review of the award of Judge Killingsworth dated March 13, 1992.

Upon de novo consideration of all evidence, the Board makes the findings and conclusions of the administrative law judge its findings of fact and conclusions of law.

AWARD

The award of Judge Killingsworth, dated March 13, 1992, is made the award of the Board.

IT IS SO ORDERED, this the 17th day of June, 1992.
Concurring: Directors Don L. Knowles and Claude A. Bray, Jr.

STATE BOARD OF WORKERS' COMPENSATION

/s/ James W. Oxendine
JAMES W. OXENDINE,
CHAIRMAN

LOGO

STATE BOARD OF WORKERS' COMPENSATION

Suite 1000, South Tower, One CNN Center
Atlanta, Georgia 30303-2788

CLAIM NUMBER 451-93-5853
ACCIDENT DATE 09/19/90
DATE March 13, 1992
CASE OF Jose A. Morales

RE: Jose A. Morales	Employee/ Deceased
Julia Corpus de Morales Juan Antonio Morales Daniel Morales P.O. Box 89121 Atlanta, GA 30312	Widow/ Claimant Minor Children
Barge-Wagener, Inc. 1815 The Exchange Atlanta, GA 30339	Employer
Argonaut Insurance Company P.O. Box 720293 Atlanta, GA 30358	Insurer
Bonny Berry Wilder Northeast Business Center 5725 Buford Highway Suite 117 Doraville, GA 30340	Counsel for Dependents
Michael Thorpe Two Decatur TownCenter 125 Clairemont Avenue Suite 520 Decatur, GA 30030	Counsel for Employer/ Insurer

Subsequent Injury Trust Fund Two Northside 75 Suite 124 Atlanta, GA 30318-7784	Party-In-Interest
Dana E. McDonald 133 Carnegie Way #508 Atlanta, GA 30303	Counsel for SITF

Based upon application of the claimant, a hearing was scheduled and held in Atlanta, Georgia on October 28, 1991, to determine all Title 34-9 issues in connection with the death of employee Jose A. Morales on September 19, 1990.

The record closed on October 28, 1992, and the transcript was filed with he [sic] Board November 13, 1992. Additional time was provided for the submission of briefs.

STIPULATIONS AND ISSUES

The only dispute betwen [sic] the claimant-dependents in this case and the employer/insurer is the constitutionality of O.C.G.A. 34-9-265(b)(5), which specifically limits the amount of recovery which may be had in a workers' compensation death case in which no surviving dependent is a resident of either the United States or Canada. Therefore, a stipulation of facts was tendered into the record by both parties, which includes the following: The parties have stipulated that they are subject to the Act, and the Board has jurisdiction of this claim. The accident occurred in Fulton County, Georgia, and venue is proper. General employment at an average weekly wage of $450.00, and notice of an accident, were also stipulated. The employer, Barge-Wagener Construction Company, had workers' compensation insurance

coverage with Argonaut Insurance Company on the date of accident.

The parties have further stipulated that the employee sustained an accident arising out of and in the course of his employment on September 19, 1990, resulting in his death, and that the accident constituted a compensable event under the Georgia Workers' Compensation Act. Juan Antonio Morales, Daniel Morales, and Julia Corpus de Morales qualify as dependents entitled to death benefits pursuant to the Georgia Workers' Compensation Act, and there are no other individuals who are entitled to receipt of benefits in this claim. None of these dependents were either citizens or residents of the United States or Canada at the time of the death of the employee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the stipulations of the parties, and a consideration of all admissible evidence, I find as fact and conclude as matters of law the following:

1. On September 19, 1990, Jose Antonio Morales fell approximately 20 stories to his death while working for Barge-Wagener Construction Company. At that time, his widow and dependent children were residents of Mexico, and were solely dependent upon the employee for their support. There are no disputes as to the facts in this case, and the sole remaining issue is one of law.

2. The dependents in this claim have disputed the constitutionality of O.C.G.A. 34-9-265(b)(5), arguing that it is a clear violation of the equal protection amendment of both the State of Georgia and the United

States Constitutions, denying the dependents a reasonable recovery under the Workers' Compensation Act, while at the same time denying them the opportunity to file a tort action against the employer in this case. It is my opinion that the dependents will prevail on this issue, there being no apparent rational basis for the legislature to distinguish between citizens of Canada and citizens of any other country that might be working in the United States and injured on the job.

3. Nevertheless, while the dependents are required to raise this challenge initially before this administrative agency, the board does not have the authority to declare the statute unconstitutional, and resolution of the constitutional question must await judicial review on appeal in a court of equity. *Flint River Mills v. Henry*, 234 Ga. 385 (1975).

4. As distasteful as it is for me to do so, I am constrained to apply O.C.G.A. 34-9-265 to the facts in this case at this time. I find that Julia Corpus de Morales, Juan Antonio Morales, and Daniel Morales are entitled to receipt of the sum of $1,000.00 as the result of the death of Jose Antonio Morales at work on September 19, 1990.

AWARD

WHEREFORE, based upon the above findings and conclusions, the employer/insurer are directed to pay to Julia Corpus de Morales the sum of $1,000.00 on behalf of herself and her children, as compensation for the death of her husband on September 19, 1990.

IT IS SO ORDERED, this 13th day of March, 1992.

STATE BOARD OF WORKERS'
COMPENSATION

/s/ Patricia M. Killingsworth
PATRICIA M. KILLINGSWORTH
Administrative Law Judge

PMK/crs

Supreme Court, U.S.
FILED
OCT 15 1993
OFFICE OF THE CLERK

No. 93-432

In The

Supreme Court of the United States

October Term, 1993

JOSE A. MORALES (Deceased/Employee), JULIA CORPUS de MORALES (Widow), JUAN ANTONIO MORALES, and DANIEL MORALES (Minor Children),

Petitioners,

v.

BARGE-WAGENER CONSTRUCTION COMPANY
(Employer)
and
ARGONAUT INSURANCE COMPANY
(Insurer),

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court For The State of Georgia

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF GEORGIA

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QUESTIONS PRESENTED

1. Whether the United States Supreme Court may review certain claimed federal constitutional violations regarding the Georgia Workers' Compensation Act death benefits provisions, in a case in which the Petitioners have failed to properly raise, preserve and obtain rulings regarding such federal issues in the state proceedings below?

2. Whether the United States Constitution requires that citizens and subjects of foreign sovereigns, who are not and have not been present within the territorial jurisdiction of the United States, and who have no corresponding responsibilities to the United States, be permitted to assert the full protections of the equal protection clause of the Fourteenth Amendment, as if they were citizens or aliens resident within the jurisdiction?

3. Whether the judgment of the state court below would be affirmed on independent state grounds, where a threshold question regarding the nature of the rights of the pertinent parties has been decided by the state court as a matter of state statutory construction?

4. Whether the death benefits provision of the Georgia Workers' Compensation Act, which provides identical benefits to a citizen's dependent beneficiaries and resident alien's dependent beneficiaries, complies with the federal equal protection clause when it reduces death benefits only as to dependent beneficiaries who are nonresident aliens?

5. Whether, assuming that a federal supremacy clause issue had been raised and decided below, the challenged death benefit limitation must be invalidated as an impermissible burden on the entrance or residence of alien workers, in conflict with any exclusive authority actually exercised by Congress?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES vii

I. STATEMENT OF THE CASE AND PROCEEDINGS BELOW 2

II. SUMMARY OF ARGUMENT 3

III. ARGUMENT AND CITATION OF AUTHORITY 6

A. THE PETITIONERS HAVE COMPLETELY FAILED TO CARRY THEIR BURDEN OF DEMONSTRATING TO THIS COURT THAT ANY FEDERAL CONSTITUTIONAL QUESTION HAS BEEN PROPERLY RAISED, PRESENTED AND PASSED UPON IN THE PROCEEDINGS BELOW 6

1. The Petitioners Abandoned any Federal Constitutional Question Before the Supreme Court of Georgia 6

2. The Petitioners Failed to Follow Established State Appellate Court Procedure Regarding Preserving any Federal Issue to be Presented on Petition for Writ of Certiorari 8

3. Any Federal Constitutional Question Not Properly Raised and Passed upon by the State Appellate Court Below May Not be Raised and Considered in the United States Supreme Court 9

TABLE OF CONTENTS – Continued

Page

B. THE PETITIONERS HAVE FAILED TO DEMONSTRATE THE PRESENCE OF ANY SPECIAL AND IMPORTANT REASONS FOR THE GRANTING OF THE WRIT, AS THIS CASE DOES NOT PRESENT A DISPUTE IN WHICH THE SUPREME COURT OF GEORGIA HAS DECIDED ANY FEDERAL QUESTION IN A MANNER IN CONFLICT WITH A DECISION OF THE HIGHEST COURT OF ANY OTHER STATE..... 10

C. THE PETITIONERS ARE NONRESIDENT ALIENS, NOT PRESENT WITHIN THE TERRITORIAL JURISDICTION OF THE UNITED STATES, SUCH THAT THEY LACK STANDING TO ASSERT ANY CONSTITUTIONAL EQUAL PROTECTION RIGHTS WITH WHICH TO ATTACK THE STATUTE..... 12

1. The Constitutional Equal Protection Rights Which the Petitioners Attempt to Assert are Properly Derived Only from Either Citizenship or Substantial Territorial Presence, Both of Which are Lacking in this Case..... 12

2. As the Petitioners are not Resident Aliens, and are not Themselves Subject to the Laws of the Jurisdiction, There Exists Neither a Rationale Nor a Jurisdictional Basis for their Claim to Assert Equal Protection-Heightened Scrutiny.. 13

TABLE OF CONTENTS – Continued

Page

3. There is No Support in Law for the Petitioners' Claim that They Have Standing to Assert the Constitutional Equal Protection Rights of a Deceased Third Party 14

a. To the Extent that the Petitioners May Make Claim to a Statutorily-Created Benefit, They are Litigants Who Have Standing, But only to Assert Rights Actually Conferred by Operation of Statute or Constitution 14

b. Constitutional Equal Protection Rights are Personal, and Here, Jurisdictional; as such, the Purported Rights of the Deceased Third Party may not be Asserted Vicariously in Order to Invalidate the Statutory Death Benefits Provision..... 16

D. THE DEATH BENEFITS PROVISIONS OF THE GEORGIA WORKERS' COMPENSATION ACT DO NOT FAIL TO SATISFY THE REQUIREMENTS OF THE EQUAL PROTECTION CLAUSE 17

1. The Nature of the Rights and Benefits of the Petitioners as Surviving Dependents are Different in Kind From, and Independent of, the Rights and Benefits of the Deceased Worker..... 18

TABLE OF CONTENTS – Continued

Page

a. Workers' Compensation Death Benefits Vest Exclusively in the Surviving Dependents, and are in no Way the "Property" of the Deceased Worker 18

b. The Theory Advanced by the Petitioners, to the Effect that the Deceased Resident Alien was denied Something to which He was Constitutionally Entitled, is Wholly without Support in Constitutional or Statutory Law 19

2. The Nonresident Alien Petitioners Cannot Invoke the Protections of the Equal Protection Clause, Such that any "Discriminatory" Aspect of the Statute is not Unlawful 21

E. THE ISSUE PRESENTED IN THIS CASE IS SUCH THAT THE OUTCOME IS GOVERNED BY INDEPENDENT STATE GROUNDS 23

F. ASSUMING, *ARGUENDO*, THAT NONRESIDENT FOREIGN NATIONALS COULD INVOKE SOME DEGREE OF CONSTITUTIONAL EQUAL PROTECTION SCRUTINY AS TO THEIR OWN RIGHTS, THE APPROPRIATE TEST WOULD BE THE "RATIONAL BASIS" TEST 24

G. NO SUPREMACY CLAUSE ISSUE WAS RAISED BELOW, AND THE SUPREMACY CLAUSE IS NOT VIOLATED BY THE GEORGIA STATUTE 26

TABLE OF CONTENTS – Continued

Page

1. The Petitioners May Not Raise a Supremacy Clause Issue for the First Time in Their Petition to this Court ... 26

2. The Supremacy Clause is Not Violated by the Georgia Statute 27

IV. CONCLUSION 30

APPENDIX

Brief of Petitioners to the Supreme Court of Georgia ..... App. 1

Motion for Reconsideration and Supporting Brief to the Supreme Court of Georgia ..... App. 8

TABLE OF AUTHORITIES

Page

CASES:

Alvarez Martinez v. Industrial Commission of Utah, 720 P.2d 416 (Utah 1986) 19, 25, 28, 29

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987)..... 9, 10, 27

Board of Regents v. Roth, 408 U.S. 564 (1972)..... 15

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 16, 17, 20

Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979)..... 28

Child v. Beame, 412 F.Supp. 593 (DCNY 1976)..... 15

County Court of Ulster v. Allen, 442 U.S. 140 (1979) 16

DeAyala v. Florida Farm Bureau Casualty Insurance Co., 543 So.2d 204 (Fla. 1989)..... 11, 17, 19, 20

Dennis v. Higgins, ___U.S. ___, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991)..... 27

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989)..... 28

Graham v. Richardson, 403 U.S. 365 (1971) 13, 14, 24, 29

Guyton v. Phillips, 606 F.2d 248 (9th Cir. 1979)..... 17

Illinois v. Gates, 462 U.S. 213 (1983) 9, 10

International Mercantile Marine Co. v. Lowe, 93 F.2d 663 (2nd Cir.), *cert. denied* 304 U.S. 565 (1938)..... 19

Jalifi v. Industrial Commission of Arizona, 644 P.2d 1319 (Ariz. Appeals 1982) 11, 19

Johnson v. Eisentrager, 339 U.S. 763 (1950) 13, 22, 24

Jurado v. Popejoy Construction Co., 853 P.2d 669 (Kansas 1993) 11, 22

TABLE OF AUTHORITIES – Continued

Page

Madera Co. v. Industrial Commission, 262 U.S. 499 (1922) 20, 21

Mathews v. Diaz, 426 U.S. 67 (1976) 21, 26

McDonald v. Board of Election, 394 U.S. 802 (1969) 25

Michigan v. Long, 463 U.S. 1032 (1983) 23, 24

Nyquist v. Mauclet, 432 U.S. 1 (1976) 20

Pedrazza v. Sid Fleming Con., Inc., 94 N.M. 59, 607 P.2d 597 (1980) 11, 19, 25

Pennell v. City of San Jose, 485 U.S. 1 (1988) 27, 28

Roe v. Wade, 410 U.S. 113 (1973) 17, 20

Silkwood v. Kerr-McGee Corp., 637 F.2d 743 (10th Cir. 1980), *cert. denied* 454 U.S. 833 (1981) 17, 20

Singleton v. Wulff, 428 U.S. 106 (1976) 16

State Industrial Insurance System v. Lodge, 822 P.2d 664 (Nev. 1991) 11, 19

Street v. New York, 394 U.S. 576 (1969) 9, 10

Turner v. United States Fidelity & Guaranty Co., 125 Ga. App. 371, 187 S.E.2d 905 (1972) 19

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) 13, 22

U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980) 25

Warth v. Seldin, 422 U.S. 490 (1975) 16

Waters-Pierce Oil Co. v. Texas, 212 U.S. 112 (1908) 27

Watts v. Mitchell, 227 Ga. 247, 179 S.E.2d 774 (1971) 10

TABLE OF AUTHORITIES – Continued

Page

Webb v. Webb, 451 U.S. 493 (1981) 8, 9, 10

Weinberger v. Wiesenfeld, 420 U.S. 636 (1974) 20

Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980) 20

Williams v. Georgia, 349 U.S. 375 (1955) 24

Yick Wo v. Hopkins, 118 U.S. 396 (1889) 13, 14, 24

STATUTES:

8 U.S.C. § 1101 *et seq.* 28

28 U.S.C.A. § 1257 ..... 4, 24

28 U.S.C.A. § 1257(a) 27

Official Code of Georgia Annotated § 34-9-1 17

Official Code of Georgia Annotated § 34-9-200 *et seq* 17

Official Code of Georgia Annotated § 34-9-260 17

Official Code of Georgia Annotated § 34-9-261 17

Official Code of Georgia Annotated § 34-9-262 17

Official Code of Georgia Annotated § 34-9-263 17

Official Code of Georgia Annotated § 34-9-264 17

Official Code of Georgia Annotated § 34-9-265-(b)(5) 2, 7, 12, 28, 29

Official Code of Georgia Annotated § 34-9-265(c) 26

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS:

U.S. CONST. amend. XIV 13, 15, 22

U.S. CONST. art. I, § 8, cl 3 and 4 ..... 27, 28

U.S. CONST. art. VI, cl 2 27

TREATISES:

Larson, *Workmen's Compensation Law*, § 63.51 (1992) 25

Larson, *Workmen's Compensation Law*, § 64.00-64.10 (1992) 19

Larson, *Workmen's Compensation Law*, § 78.62 (1992) 11

No. 93-432

In The

Supreme Court of the United States

October Term, 1993

JOSE A. MORALES (Deceased/Employee), JULIA CORPUS de MORALES (Widow), JUAN ANTONIO MORALES, and DANIEL MORALES (Minor Children),

Petitioners,

v.

BARGE-WAGENER CONSTRUCTION COMPANY
(Employer)
and
ARGONAUT INSURANCE COMPANY
(Insurer),

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court For The State of Georgia

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF GEORGIA

COME NOW Barge-Wagener Construction Company, Employer, and Argonaut Insurance Company, Insurer, Respondents, and respectfully respond to the Petition for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Georgia in this case.

I.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

As stated in the Petition for Writ of Certiorari, the questioned portion of the Georgia Workers' Compensation Act, O.C.G.A. § 34-9-265(b)(5), was initially challenged by the Petitioners during the administrative law proceedings below, as being violative of the equal protection clauses of the Georgia and United States Constitutions. Then, before the Superior Court of Fulton County in its role as an appellate court, the Petitioners did initially seek a declaration of unconstitutionality under either the Georgia or federal Constitution. However, that court reached a decision only as to the state law question, and did not pass upon the federal question.

At all times after the issuance of the order of the Superior Court of Fulton County, the Petitioners have declined to seek, and the Georgia Supreme Court did not consider, any review of O.C.G.A. § 34-9-265(b)(5) as being violative of the federal Constitution. Rather, in response to the appeal of the Respondents herein to the Supreme Court of Georgia, the Petitioners expressly abandoned any quest for appellate review of any federal question. In their brief to the Supreme Court of Georgia, Petitioners did not raise the separate federal ground, did not argue it, and expressly asked that the Court affirm the order of Superior Court on exclusively state constitutional grounds. (Appendix 1-7). The Supreme Court of Georgia did not have before it, and did not pass upon, the federal questions raised by Petitioners before this Court.

Further, at no stage of the proceedings below, either at trial or on appeal, have the Petitioners raised any allegation of constitutional infirmity of the challenged statute on federal supremacy clause grounds. Such

grounds are presented for the first time in their petition to this court of last resort.

II.

SUMMARY OF ARGUMENT

In a manner clearly contrary to the controlling precedents of this Court, the claimed statutory basis for jurisdiction, and the rules of this Court governing review on writ of certiorari, the Petitioners herein seek to raise a series of questions regarding federal constitutional law, which have not been properly raised and passed upon by the trial and appellate courts below.

In their petition to this Court the Petitioners have asserted that the challenged statute is unconstitutional under the federal Constitution as being violative of the supremacy clause, in that it allegedly "imposes a discriminatory burden upon aliens lawfully within the United States and conflicts with Congress' exclusive constitutional authority to regulate immigration and naturalization." However, as revealed by their own failure to specify to this Court the points in the proceedings below where such issue was raised, as required by this Court's Rule 14(h), no such question regarding exclusive federal power to regulate immigration under the supremacy clause was ever raised at any stage of the litigation below. Therefore, the Petitioners are barred from raising such issue before this Court for the first time.

Although during the trial and initial appellate stages of this litigation the Petitioners did raise both Georgia and federal constitutional equal protection questions, no administrative tribunal or court has ever passed upon any such federal equal protection question. Rather, at all stages, this case has been decided exclusively on state statutory and constitutional grounds. Further, the Petitioners have not only failed to properly preserve and seek

ruling upon such federal questions, they have in fact expressly abandoned any federal equal protection question before the appellate courts of Georgia. Under the controlling precedents of this Court, the Petitioners are barred from seeking an initial determination of such questions by this Court, as this Court must conclude that Petitioners have failed to properly present and seek ruling upon any federal question in the state courts.

Further, contrary to the jurisdictional mandate of 28 U.S.C.A. § 1257, as applied by this Court in its Rule 10, the Petitioners have failed to demonstrate that, in this case, the Georgia Supreme Court has decided any federal question in a manner in conflict with the decision of any other state's highest court as to this same question. Although the courts of Florida and Kansas may have erroneously attempted to extend the reach of equal protection beyond the borders of the United States, the appellate courts of Georgia in this case did not decide any such issue. Therefore, this case does not present a question for this Court's consideration under Rule 10.1(b).

It is respectfully submitted that, if this Court were to grant this petition, the resulting decision on the merits would inevitably be the same as that reached by the Supreme Court of Georgia, for reasons of state law which are independent of any federal question, and which themselves determine the outcome. As such, consideration of this case would result in nothing more than an advisory opinion as to the validity of the decision of the state courts regarding questions of state law. Under such circumstances, jurisdiction is lacking.

The Petitioners are nonresident aliens, who are not and have not been present within the jurisdiction of the United States, such as would empower them with federal equal protection rights with which to challenge the Georgia Workers' Compensation Act. As a result, the Supreme

Court of Georgia correctly held that such nonresident aliens may not invoke the constitutional protections reserved for citizens and residents of Georgia and the United States. Therefore, to whatever extent the death benefits provision discriminates against them, such discrimination is not unlawful.

Before the Supreme Court of Georgia the Petitioners sought to expand the reach of the Georgia Constitution's equal protection clause beyond the borders of the United States. Here, the Petitioners would have this Court, in effect, adopt such a "global view" of the reach of the federal equal protection clause. Further, the fallacious argument advanced by Petitioners to achieve this purpose would require that this Court overrule the judgment of the state Supreme Court as to purely state law questions of statutory construction, and in effect, allow the Petitioners to assert the constitutional rights of a deceased third party. However, the law of Georgia, the law of a majority of sister states interpreting their own similar statutes, federal precedent and the leading scholarly treatise all establish that workers' compensation death benefits are independent and mutually exclusive of any benefit to which the deceased worker could have asserted any interest. Therefore, the Petitioners may not stand in the shoes of the deceased worker in order to assert constitutional rights which they themselves lack. Indeed, constitutional rights are personal, and may not be asserted here vicariously.

Properly analyzed, the Georgia Workers' Compensation Act in no way discriminates unlawfully. The benefits to which a resident alien worker has an actual legal interest, and may make claim, are identical to those which benefit a worker who is a United States citizen. Medical and disability benefits, regarding which the worker has an actual interest, are granted without regard

to national origin. Further, dependents of alien workers, who are themselves residents, become entitled to full death benefits on the same footing as citizen dependents. Thus, constitutionally protected resident aliens are not subject to any unlawful discrimination. The Georgia Legislature has, however, decided to sharply limit death benefits flowing to foreign nationals who reside outside the jurisdiction, in a manner which offends no provision of the federal Constitution.

Assuming, *arguendo*, that the Petitioners were entitled to some degree of equal protection, the appropriate standard of review would be the "rational basis" test. The rationale for heightened scrutiny is lacking here, in that the Petitioners themselves are not a "discrete and insular minority" subject to the laws of the United States; indeed, they are not subject to the laws at all, as they have elected to reside in their own nation. Therefore, the challenged statute is entitled to deferential review as to the conceivable rational bases for it. Here, the difficulties involved in administering such a benefit plan on behalf of beneficiaries residing in foreign nations could be considerable, such that a conservative fixed benefit is hardly "irrational."

III.

ARGUMENT AND CITATION OF AUTHORITY

A. THE PETITIONERS HAVE COMPLETELY FAILED TO CARRY THEIR BURDEN OF DEMONSTRATING TO THIS COURT THAT ANY FEDERAL CONSTITUTIONAL QUESTION HAS BEEN PROPERLY RAISED, PRESENTED AND PASSED UPON IN THE PROCEEDINGS BELOW.

1. The Petitioners abandoned any federal constitutional question before the Supreme Court of Georgia.

At the initial trial and appellate levels the Petitioners did raise a constitutional challenge to O.C.G.A.

§ 34-9-265(b)(5) on state and federal grounds. However, in rendering its decision on appeal, the Superior Court considered only the state constitutional equal protection argument when it declared the statute to be unconstitutional; that court expressly did not reach any federal question. (Appendix pp. 1A-8A of Petition for Writ.) Respondents herein sought and were granted an appeal to the Supreme Court of Georgia, citing the Superior Court's interpretation of state statutory and state constitutional law as being in error. On appeal to the Supreme Court of Georgia the Petitioners herein declined to urge the Court to consider any federal question whatsoever; rather, on brief and oral argument the Petitioners expressly urged that court to affirm the order of the Superior Court exclusively on state constitutional grounds. (Appendix 1-7.) The Supreme Court of Georgia properly considered and passed upon only those issues presented to it, those being exclusively state law issues. (Appendix pp. 1A-8A of Petition for Writ.)

The Petitioners timely filed a Motion for Reconsideration with the Supreme Court of Georgia, pursuant to Georgia Supreme Court Rule 47. However, that motion and the brief in support thereof presented to that Court no federal question; rather, the Petitioners expressly asked that Court to reinstate the order of the Superior Court on exclusively state constitutional grounds. Indeed, the Petitioners conceded that there was no federal constitutional right which they could invoke in their favor. Rather, the Petitioners argued,

> Applicants would argue this Court look no further in its equal protection analysis than the State Constitution of Georgia. The property right was created by the State of Georgia and should be governed by our state Constitution which decrees that protection to person and property shall be *impartial* and complete.

(Appendix 11-12.) Having previously considered fully the questions of state statutory and constitutional law, the Court denied that Motion for Reconsideration. (Appendix 1A of the Petition for Writ.)

2. The Petitioners failed to follow established state appellate court procedure regarding preserving any federal issue to be presented on petition for writ of certiorari.

The rules promulgated by the Supreme Court of Georgia provide for a procedure in those cases where a dissatisfied party intends to seek review by the United States Supreme Court of any federal question decided by the state court. Georgia Supreme Court Rule 61 requires that

> Any party desiring to have the remittitur stayed in this court in order to appeal or seek a writ of certiorari in the United States Supreme Court shall file in this court a motion to stay the remittitur with a concise statement of the issues to be raised on appeal or in the petition for certiorari. Such notice shall be filed at the time of filing a motion for rehearing, or if no motion for rehearing is filed, within the time allowed for the filing of same.

Here, the Petitioners filed and served upon Respondents herein only a Motion for Reconsideration, solely on state grounds, while no motion to stay the proceedings pending petition for writ of certiorari with this Court was filed and served. As stated by this Court in *Webb v. Webb*, 451 U.S. 493, 495 (1981), a party's failure to comply with state procedural rules regarding the raising and preservation of issues may result in this Court declining to consider such issues.

3. Any federal constitutional question not properly raised and passed upon by the state appellate court below may not be raised and considered in the United States Supreme Court.

Although there has been some debate within the opinions of this Court as to whether such a bar to consideration is jurisdictional or prudential, it is absolutely clear that the Petitioners are barred from presenting to this Court any federal constitutional question which was not pressed or passed upon in the state proceedings below. In a petition for writ of certiorari, where the state court has not passed upon any federal question, it will be assumed that such is the result of a want of proper presentation by the interested party in the state court. *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987). Only where the interested party can demonstrate affirmatively to the contrary will this Court conclude that such party has properly presented such issue, yet been denied a decision. *Id.*

In *Webb v. Webb, supra*, 495, this Court concluded that a petition for writ of certiorari was improvidently granted where it was subsequently revealed that the petitioner had failed to expressly raise and obtain a decision as to a federal question. Just as the Court did in *Rotary Club, supra*, the Court cited the well established rule in this regard as found in *Street v. New York*, 394 U.S. 576, 582 (1969). To be clear, this Court requires that such federal question be both raised and passed upon by the court below; otherwise, even if initially entertained on a writ of certiorari, this Court will decline to decide a federal issue in the absence of a lower court decision on the issue. *Illinois v. Gates*, 462 U.S. 213, 218 (1983). Further, as indicated above and in *Webb, supra* at 495, this Court will require a party to comply with procedural rules of the state appellate court. Here, the Petitioners failed to

comply with Ga. Supreme Ct. Rule 45, which states that any argument not advanced on brief is abandoned. *Watts v. Mitchell*, 227 Ga. 247, 179 S.E.2d 774 (1971).

The federal constitutional equal protection issue which the Petitioners would have this Court review is simply not properly presented before this Court. Under the authority cited above, the mere fact that the Petitioners obtained no decision of any federal question in the courts below is reason enough to deny the petition. *Rotary Club, supra; Webb, supra; Street, supra; Gates, supra.* Here, however, the record supports more than a mere assumption that such issues were not properly presented below. Rather, the written arguments and motions submitted to the court below demonstrate without doubt that the Petitioners elected to rely exclusively upon a state law-based challenge to the statute, such that no federal constitutional question has been preserved for presentation to this Court. At the very least, principles of comity require that the Petitioners not be permitted to reserve review of the federal question until brought before this Court. Indeed, it is submitted that, under the facts and controlling authorities, the jurisdiction of this Court over any federal question has not been demonstrated.

B. THE PETITIONERS HAVE FAILED TO DEMONSTRATE THE PRESENCE OF ANY SPECIAL AND IMPORTANT REASONS FOR THE GRANTING OF THE WRIT, AS THIS CASE DOES NOT PRESENT A DISPUTE IN WHICH THE SUPREME COURT OF GEORGIA HAS DECIDED ANY FEDERAL QUESTION IN A MANNER IN CONFLICT WITH A DECISION OF THE HIGHEST COURT OF ANY OTHER STATE.

The Petitioners argue that the highest courts of several states conflict as to the federal equal protection issues supposedly presented in this case. However, the

nature of what conflict there has been among the other state courts has been largely the result of differences of opinion among those state courts regarding state law questions of interpretation of the nature of the benefits and statutory rights created by the various state workers' compensation statutes.

The appellate courts of two states, Florida and Kansas, have recently deviated from the majority view of the respective nature of the rights and benefits created by workers' compensation disability and death provisions. The accepted and better reasoned view is that death benefits are *sui generis*, completely independent of any "property interest" of the worker, such that the worker has no "rights" to such benefits. The critical point here is that these decisions turn entirely upon state law interpretations of the nature of workers' compensation death benefits, as they are created and defined by state statutes. *DeAyala v. Florida Farm Bureau Casualty Insurance Co.*, 543 So.2d 204 (Fla. 1989); *Pedrazza v. Sid Fleming Con., Inc.*, 94 N.M. 59, 607 P.2d 597 (1980); *Jalifi v. Industrial Commission of Arizona*, 644 P.2d 1319 (Ariz. Appeals 1982); *Jurado v. Popejoy Construction Co.*, 853 P.2d 669 (Kansas 1993); *see also State Industrial Insurance System v. Lodge*, 822 P.2d 664 (Nev. 1991) and Larson, *Workmen's Compensation Law*, § 78.62 (1992).

Further, and fatal to the Petitioners' position in their petition, is the fact that, in this case, the highest court of Georgia has not decided any federal question, expressly or by implication, in a manner in conflict with any other state's court. Indeed, no federal question has been decided at all. Therefore, pursuant to this Court's Rule 10.1(b), no reason is presented for this Court to grant the writ in this case.

C. THE PETITIONERS ARE NONRESIDENT ALIENS, NOT PRESENT WITHIN THE TERRITORIAL JURISDICTION OF THE UNITED STATES, SUCH THAT THEY LACK STANDING TO ASSERT ANY CONSTITUTIONAL EQUAL PROTECTION RIGHTS WITH WHICH TO ATTACK THE STATUTE.

The Petitioners would demean the analysis of the Supreme Court of Georgia, when the Petitioners assert that the Court effected an "end run" around controlling equal protection provisions in order to "save an archaic and discriminatory statutory provision." Petition at p. 10. To the contrary, it is the Petitioners who would have this Court engage in such an "end run" around well settled constitutional principles, in order to avoid what remains the ultimate fatal flaw in their case: the fact that nonresident aliens are parties who may not assert any constitutional equal protection rights, invoking any level of judicial scrutiny, in order to attack the validity of O.C.G.A. § 34-9-265(b)(5). The Petitioners would urge this Court to effect a radical deviation from controlling constitutional authorities, and in effect, proclaim a new "global view" of constitutional rights, which this Court has previously, and expressly, rejected.

1. The constitutional equal protection rights which the Petitioners attempt to assert are properly derived only from either citizenship or substantial territorial presence, both of which are lacking in this case.

The Petitioners would have this Court effect an "end run" around not only the plain language of the equal protection clause of the Fourteenth Amendment, but all of the opinions of this Court interpreting the application of that clause, as well.

> . . . no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV. This Court has repeatedly held that federal constitutional rights arise from two sources only: either citizenship or presence within the territorial jurisdiction with substantial connections to the jurisdiction. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990). Affirming the principle of territorial jurisdictional limitation enunciated in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), this Court in *Verdugo-Urquidez* held that aliens who are not present within the territory of the United States simply do not have the benefit of fundamental United States constitutional protections. Aliens who are residents are afforded equal protection of the laws because they are subject to the laws of the jurisdiction, and have protections commensurate with their ties and obligations to the jurisdiction. *Yick Wo v. Hopkins*, 118 U.S. 396 (1889); *Graham v. Richardson*, 403 U.S. 365 (1971). However, at no time has this Court construed the plain language of the Fourteenth Amendment as extending the protection and power of the equal protection clause beyond its borders and its citizenry. Indeed, in response to an attempt to extend Fourth Amendment and Fifth Amendment protections to nonresident aliens, this Court has recently rejected this "global view" of the Constitution. *Verdugo-Urquidez, supra* at 268.

2. As the Petitioners are not resident aliens, and are not themselves subject to the laws of the jurisdiction, there exists neither a rationale nor a jurisdictional basis for their claim to assert equal protection-heightened scrutiny.

Resident aliens are treated as a "discrete and insular minority" within the jurisdiction, being subject to the power of the jurisdiction and having substantial ties and

obligations to it. *Yick Wo v. Hopkins, supra; Graham v. Richardson, supra.* However, the Petitioners in this case possess neither the constitutional jurisdictional basis with which to assert the protection of the equal protection clause, nor the unique status of a "discrete and insular minority" which justifies heightened judicial scrutiny. Although their husband and father, the decedent, did enter the jurisdiction and thereby invoke corresponding rights and obligations as to himself, neither he nor the Petitioners in any way ever submitted or subjected the Petitioners to the jurisdiction, such as would invoke either right or obligation. This being obvious, the Petitioners now seek to have this Court bestow upon them constitutional rights, as if they stood in the shoes of the decedent.

3. There is no support in law for the Petitioners' claim that they have standing to assert the constitutional equal protection rights of a deceased third party.

Contrary to the assertions of the Petitioners, the decision of the Georgia Supreme Court does not rest upon a "failure to properly focus" constitutional analysis upon the deceased resident alien worker. Rather, that Court properly applied the correct constitutional analysis to the correct statutory analysis of the nature and position of the parties, and of the benefits created and defined by the challenged statute. The Petitioners would have this Court substitute its judgment for the judgment of the state Supreme Court, as to those questions of state statutory construction which are exclusively within the province of the state court.

a. To the extent that the Petitioners may make claim to a statutorily-created benefit, they are litigants who have standing, but only to assert rights actually conferred by operation of statute or constitution.

It is not denied that the Petitioners are "persons" who may assert due process rights in order to protect whatever lawful interests they may have as parties to this action. U.S. CONST. amend. XIV. However, those "property" interests to which the Petitioners are entitled are only those which have actually been created or have accumulated pursuant to law. Due process rights may not be invoked to subsequently modify the value of the interest to which an entitlement is asserted.

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Board of Regents v. Roth, 408 U.S. 564 (1972).

> For appellants to acquire the right contended for, so that it is a protected "property" interest under the Fourteenth Amendment, it must appear that the state intended to confer that right. Once conferred, its deprivation requires compliance with procedural due process.

Child v. Beame, 412 F.Supp. 593, 605 (DCNY 1976).

However, the Petitioners here seek to substantively expand the value of the state-created workers' compensation death benefit, by claiming that they must also be allowed to assert the equal protection rights of the decedent resident alien. The Petitioners would have this Court, in effect, adopt the "global view" of constitutional rights which it has previously rejected, and then substitute its judgment as to purely state law questions, in

order to achieve what the Petitioners would urge as a "desirable" result in this case. The mechanism the Petitioners would have this Court employ would involve a defective analysis of the nature of the rights and interests of the various persons affected by the statute. Having been granted a statutorily created, albeit limited, death benefit, the Petitioners would then have this Court bootstrap the Petitioners into the place of the decedent worker, so that the Petitioners may then claim that the statute has somehow violated the constitutional rights of the resident alien deceased worker.

b. Constitutional equal protection rights are personal, and here, jurisdictional; as such, the purported rights of the deceased third party may not be asserted vicariously in order to invalidate the statutory death benefits provision.

Fundamental constitutional rights are personal and may not be asserted vicariously. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *County Court of Ulster v. Allen*, 442 U.S. 140 (1979). Where, as here, the Petitioners do have some stake in the controversy, the issues regarding which they have standing to mount a constitutional challenge are necessarily limited by whatever legal rights and interests they actually possess.

The Petitioners "must assert [their] own legal rights and interests, and cannot rest [their] claim to relief on the legal rights or interests of the third party." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). A statutory scheme which necessarily entails a right to sue, i.e. standing, does not also effectuate a transfer of some related third party's constitutional rights. *Id.* Even where there is a close relation between the litigant and the third party, the general rule is that persons must assert their own rights. *Singleton v. Wulff*, 428 U.S. 106 (1976).

Further, it is axiomatic that litigants may not assert supposed civil or constitutional rights of deceased persons, as such rights do not survive the death of such person. *Roe v. Wade*, 410 U.S. 113 (1973); *Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743 (10th Cir. 1980), *cert. denied* 454 U.S. 833 (1981); *Guyton v. Phillips*, 606 F.2d 248 (9th Cir. 1979); *see also* dissent in *DeAyala v. Florida Farm Bureau Casualty Insurance Co., supra.*

The only lawful exceptions under which this Court has permitted litigants to seek redress regarding the rights of third parties have been in those cases involving "the most weighty countervailing policies". That is, such may be allowed only where individuals not party to a suit stand to suffer some actual loss by its outcome, yet have no effective avenue of preserving their rights themselves, or in certain First Amendment cases. *Broadrick, supra* at 611. Such factors are completely lacking in this case, as the third party decedent was subject neither to hostile legislation nor any bar to litigation, as to his own rights.

D. THE DEATH BENEFITS PROVISIONS OF THE GEORGIA WORKERS' COMPENSATION ACT DO NOT FAIL TO SATISFY THE REQUIREMENTS OF THE EQUAL PROTECTION CLAUSE.

It is critical to note from the outset that the Georgia Workers' Compensation Act provides resident aliens working in the United States with the same benefits as it does U.S. citizens. The medical and disability benefits created by the Act for the benefit of the worker are identical as to aliens and citizens. O.C.G.A. §§34-9-1; 34-9-200 *et seq.*; 34-9-260-264. Indeed, if the Act did discriminate against the resident alien worker by reducing the value of the benefits to which he or she might make claim, then the Act might be subject to heightened scrutiny equal protection attack. However, the Act does not

make any distinction between the resident alien and the citizen in terms of any form of benefit to which the resident alien has any actual "property interest." The death benefits provisions of the Act are a separate and independent statutory scheme of benefits, created only to benefit persons other than the worker, and not subject in any way to control or claim by the worker. As such, the worker has no identifiable legal interest in death benefits which may accrue, if at all, only after the death of the worker and a showing of ongoing dependency by the dependents.

1. The nature of the rights and benefits of the Petitioners as surviving dependents are different in kind from, and independent of, the rights and benefits of the deceased worker.

A threshold question in the proceedings below was resolved by way of the highest appellate court of Georgia construing the nature of the rights and benefits which flow to dependents, as opposed to workers. Here, the Supreme Court of Georgia, in a manner consistent with the majority of other state courts, construed its own unique death benefits statute as involving sets of benefits and rights, created for workers and surviving dependents, which are separate, distinct and indeed, mutually exclusive of each other. The Petitioners urge this Court to substitute its judgment regarding how the Georgia Legislature and courts might have granted broader and more valuable benefits, without citing any precedent for the proposition that the Constitution requires such a result.

a. Workers' compensation death benefits vest exclusively in the surviving dependent, and are in no way the "property" of the deceased worker.

The Supreme Court of Georgia correctly rejected the theory advanced by the Petitioners below, that the

statutory death benefits are a "property" interest of the deceased worker, such that limiting such "property" as flowing to nonresident alien dependents would then violate the constitutional rights of the deceased worker. Rather, the Court held that, "Death benefits do not become part of the estate of the deceased, and are not liable for his debts," but rather, such benefits are, "the exclusive property of the beneficiaries." Appendix of Petition, p. 3A. Such benefits "are separate and distinct from the right to compensation vested in the employee by reason of injury." *International Mercantile Marine Co. v. Lowe*, 93 F.2d 663 (2nd Cir.), *cert. denied* 304 U.S. 565 (1938). The interpretation by the Supreme Court of Georgia as to its statute incorporates the majority rule among the states. *State Industrial Insurance System v. Lodge, supra; Pedrazza v. Sid Fleming Con., Inc., supra; Jalifi v. Industrial Commission of Arizona, supra; Alvarez Martinez v. Industrial Commission*, 720 P.2d 416 (Utah 1986).

The deceased employee had no control over, and could have derived no actual benefit from, any death benefit which might accrue after his death. He could not exchange it for value or modify it in any way. It was never his "property." *Turner v. United States Fidelity & Guaranty Co.*, 125 Ga. App. 371, 187 S.E.2d 905 (1972); Larson, *Workmen's Compensation Law*, §64.00-64.10 (1992).

b. The theory advanced by the Petitioners, to the effect that the deceased resident alien was denied something to which he was constitutionally entitled, is wholly without support in constitutional or statutory law.

The Supreme Court of Georgia correctly declined to follow the circular reasoning of the Florida court in *DeAyala, supra*, to the effect that the death benefits limitation somehow diminishes the "fruits of labor" of the resident alien. Quite obviously, the only reasoning through which

the Florida court then permitted a constitutional challenge to the statute required that the court completely ignore the principles which prohibit the dependents from asserting the constitutional rights of the decedent. *Broadrick, supra; Roe v. Wade, supra; Silkwood v. Kerr-McGee, supra.*

In their petition to this Court, the Petitioners argue for an identical conclusion as in *DeAyala*, while attempting to frame their argument in terms of language of this Court, derived from cases deciding completely dissimilar issues. The Petitioners' reliance upon *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980), and *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1974), is misplaced, as the issues therein were insupportable gender-based discrimination, in absence of any issues pertaining to nonresident aliens. *Nyquist v. Mauclet*, 432 U.S. 1 (1976) is equally inapposite, as it involved a well-founded challenge by resident aliens to a state barrier to equal higher education assistance, under circumstances where their own rights were affected.

The Petitioners' central argument is that this Court "must" focus equal protection analysis on the "rights of the resident alien workers", as if such a conclusion were required by this Court's decision in *Madera Co. v. Industrial Commission*, 262 U.S. 499 (1922). Here the Petitioners urge this Court to engage in sleight of hand in analyzing the threshold questions regarding what persons have interests at stake, and what rights they may assert. Contrary to the Petitioners' claims, this Court's precedents do not "establish that the focus of the equal protection analysis in this case must be centered on the rights of the resident alien workers . . . ". *See* Petition, p. 8.

In *Madera, supra*, this Court affirmed the authority of a state legislature to grant to nonresident aliens a statutory death benefit, in the face of a substantive due

process/unconstitutional taking challenge by the employer. This Court found that creating such a benefit was a permissible exercise of legislative power, as there was some rational basis for doing so.

> . . . there is no constitutional provision requiring that the benefits of such legislative scheme be limited to citizens or residents of the state.

Id. at 503. Conversely, *Madera* does not support the Petitioners' proposition that the equal protection clause of the Constitution requires that the legislature do what the due process clause permits it to do. *Id.*

Further, characterizing the disability and death benefits provisions of workers' compensation acts as being "component parts of a single system of rights and liabilities arising out of the employer-employee relationship" does not lead to the conclusion that different types of claimants, entitled to separate and mutually exclusive types of benefits, may stand in one another's shoes in order to gain a constitutional trump card, which they otherwise lack. *Id.* at 501. A party must still have standing to assert its own constitutional rights, if any.

2. The nonresident alien petitioners cannot invoke the protections of the equal protection clause, such that any "discriminatory" aspect of the statute is not unlawful.

Merely invoking the value charged words "discriminatory" and "based upon alienage" will not create a constitutional barrier to any and every classification which may affect aliens. Indeed, this Court has held that the Constitution does not require that all aliens be entitled to enjoy all of the advantages of citizenship, or that all aliens must be placed into a single homogenous legal classification. *Mathews v. Diaz*, 426 U.S. 67, 78 (1976). Rather, for any statute to be constitutionally infirm

regarding aliens, there must be an actual violation of an identifiable constitutional right.

Nevertheless, the Petitioners urge this Court to adopt the defective analysis employed by the Supreme Court of Kansas in *Jurado v. Popejoy Construction Co., supra,* wherein that court ventured,

> Simply because the statute does not similarly discriminate against resident aliens does not make it any less an alienage classification.

Id. at 675. The fallacy in that court's reasoning is obvious. The statute classifies based upon a combination of alienage and nonresidency. The persons affected, the nonresident dependents, are outside the territorial jurisdiction, and therefore utterly without constitutional rights to be violated. U.S. CONST. amendment XIV; *Verdugo-Urquidez, supra; Johnson v. Eisentrager, supra.*

Further, it is obvious that there is independent constitutional support for the classification resulting in United States citizens who are nonresidents being treated differently from mere nonresident aliens. Citizens derive additional constitutional protections beyond those afforded to aliens through operation of the privileges and immunities clause of the federal Constitution. United States Constitution, Amendment XIV. Therefore, the "disparate treatment of these two classes of nonresidents" is not "solely based on alienage", and thus impermissible. Constitutional rights arise from either citizenship or residency; when both are lacking, the pertinent party may not invoke constitutional protections.

The Supreme Court of Georgia correctly analyzed the problem in framing the issues in its opinion:

> This case raises two issues: first, whose rights are at stake, the decedent worker's or the nonresident dependents? Second, does O.C.G.A. §34-9-265(b)(5) violate the pertinent party's rights . . . ?

See Appendix of Petition, pp. 3, 4. Correctly analyzed, the question was correctly answered: the pertinent parties, asserting whatever rights they may have, are unable to make any claim to constitutional equal protection rights, such that the statutory classification is not an unlawful one.

It is respectfully submitted that the arguments presented by the Petitioners, and apparently accepted by the courts of Kansas and Florida, constitute little more than a constitutional subterfuge, designed to achieve what the Petitioners perceive as a "desirable" result. If it is desirable to achieve such a result, this purely policy decision must be made by the legislatures, and should not be effected by this Court's adopting a tortured reading of decades of constitutional precedent regarding standing and jurisdiction.

E. THE ISSUE PRESENTED IN THIS CASE IS SUCH THAT THE OUTCOME IS GOVERNED BY INDEPENDENT STATE GROUNDS.

A given case is not properly within the jurisdiction of this Court if the decision of the state court would still be upheld on independent state grounds. *Michigan v. Long*, 463 U.S. 1032 (1983). Even assuming that the Petitioners had properly preserved any federal question, the threshold question of the nature of the rights of the pertinent party is one of exclusively state statutory construction. Of course, a state may not enact and construe a statutory scheme so as to defeat a legitimate federal constitutional interest. Nevertheless, in a case where the statute creates a benefit which in itself is not federally mandated, and which is not dispensed in a manner which violates the rights of any actually protected class, it cannot be said that the federal Constitution requires that this Court substitute its judgment for that of the state in defining the

nature of the benefit. Absent a design to circumvent the federal Constitution, a question of state statutory construction is solely a state court question. *Cf. Williams v. Georgia*, 349 U.S. 375 (1955). Indeed, the jurisdiction of this Court is not invoked as to purely state law questions. 28 U.S.C.A. §1257.

Here, this Court would render a mere advisory opinion if it did review this case, because the unavoidable threshold question is one of state law, that is, the nature and scope of the benefits created by the state statute. As there is no resident alien who is actually affected by the portion of the statute complained of, there is no federal law violation inherent in the statute as construed. *Michigan v. Long, supra.*

F. ASSUMING, *ARGUENDO*, THAT NONRESIDENT FOREIGN NATIONALS COULD INVOKE SOME DEGREE OF CONSTITUTIONAL EQUAL PROTECTION SCRUTINY AS TO THEIR OWN RIGHTS, THE APPROPRIATE TEST WOULD BE THE "RATIONAL BASIS" TEST.

It should be clear that foreign nationals residing in their native lands may not invoke heightened judicial scrutiny under equal protection, as such scrutiny is reserved to protect the rights of the "discrete and insular minority" of aliens actually residing within the United States. *Yick Wo v. Hopkins, supra; Graham v. Richardson, supra; Johnson v. Eisentrager, supra.* As heightened scrutiny does not apply here, the question arises, what if any level of equal protection scrutiny should be applied? On the one hand, it is submitted that nonresident aliens are entitled only to due process, but not equal protection, as the appellate courts of several sister states have found in

deciding similar challenges. *Alvarez Martinez v. The Industrial Commission, supra; Pedrazza v. Sid Fleming Con., Inc., supra.*

Notwithstanding the compelling arguments for the complete inapplicability of equal protection to the facts of the present case, it is readily apparent that the challenged statute should survive equal protection scrutiny. Absent any basis for the invocation of heightened scrutiny, the challenged statute limiting death benefits accruing to foreign nationals is entitled to a presumption of validity, and must be upheld, as it is based upon rational distinctions, where the basis of the classification can be construed as bearing a direct and real relation to the object or purpose of the legislation. *McDonald v. Board of Election*, 394 U.S. 802 (1969); *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980).

Under this far more deferential standard of review, the challenged statute easily withstands the equal protection challenge. The Petitioners have failed to carry their burden of demonstrating that the challenged classifications cannot rationally be sustained. If for no other reason, the classification establishing a strict limitation of liability benefiting foreign nationals should be sustained, in that the classification is born "not of any desire to discriminate but one of the awkward problem of truth and continuing administration which is unavoidably present in those cases." Larson, *Workmen's Compensation Law*, §63.51 (1992). It is certainly reasonable to conclude that the legislature had a legitimate rational basis for declining to place upon the employers and insurers of Georgia a duty to forward open-ended dependency benefits to persons residing in foreign countries, without having the benefit of any unduly burdensome means of monitoring the continuing dependency status of the recipients. Unlike life insurance, the beneficiaries under the

workers' compensation death benefits provision are not absolutely entitled to ongoing receipt of benefits of a predetermined value; rather, such recipients are subject to periodic confirmation of their dependency status, as "the compensation provided for in this code section shall be payable only to dependents and only during dependency." O.C.G.A. §34-9-265(c).

It should be noted that the argument advanced by Petitioners, to the effect that preferential treatment of Canadian dependents over all other nationalities, is somehow constitutionally offensive, is itself wholly without constitutional support. Citing the dissent of Justice Benham in the decision of the court below, Petitioners argue that preferential treatment, not in itself required by the Constitution, to Canadian workers, is somehow "irrational". First, such argument completely ignores the simple fact that the United States has traditionally enjoyed a unique economic and political relationship with Canada that is not shared with any other foreign country. Second, there simply is no constitutional support for the argument that the granting of a non-required benefit to one group of foreign nationals somehow constitutes a denial of a required benefit to another group. Indeed, as stated by this Court in *Mathews v. Diaz, supra,* the Constitution does not require that all classes of aliens be treated in an identical manner.

G. NO SUPREMACY CLAUSE ISSUE WAS RAISED BELOW, AND THE SUPREMACY CLAUSE IS NOT VIOLATED BY THE GEORGIA STATUTE.

1. The Petitioners may not raise a supremacy clause issue for the first time in their petition to this Court.

As has been argued extensively earlier, the Supreme Court of the United States will not review a claim that a

state statute is constitutionally invalid where no federal question was preserved and decided by the state court of last resort. It is hornbook law, moreover, that the U.S. Supreme Court will decline to address any federal constitutional issue raised for the first time in a petition for review to the Court. *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 112 (1908).

In their petition to this Court, the Petitioners have for the first time raised the issue whether the Georgia statute is invalid under the supremacy clause by reason of the specific grant to the Congress of power over naturalization and immigration contained in article I, §8, cl 3 and 4 of the U.S. Constitution. (Petition, pp. 26-28) No decision below, and no pleading below filed by the Petitioners, makes any argument grounded in a constitutional provision (whether it be the Georgia Constitution or, arguably, the federal Constitution) *other than the asserted denial of equal protection.* The question whether the supremacy clause is violated by the Georgia statute because of the Congress' plenary powers under article I, §8, cl 3 and 4 has not been raised for a decision by any court below and, thus, this Court has not been presented with a claim as to that constitutional provision subject to this Court's appellate jurisdiction under 28 U.S.C.A. §1257(a). *Board of Directors of Rotary International v. Rotary Club of Duarte, supra.*

2. The supremacy clause is not violated by the Georgia statute.

The supremacy clause of the federal Constitution (art. VI, cl 2) is not itself a source of any federal rights; rather the supremacy clause secures federal rights – whether created by other, substantive provisions of the Constitution, or by treaty, statute, or regulation – whenever they come into conflict with state law. *Dennis v.*

Higgins, ___ U.S. ___, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979). Here, the Petitioners cite no provision of the Federal Immigration and Nationality Act, 8 U.S.C. §1101 *et seq.*, as having been violated by O.C.G.A. §34-9-265(b)(5), as indeed they could not do since that comprehensive codification of matters dealing with alienage and immigration does not guarantee workers' compensation death benefits of any description. Instead, the Petitioners rely for their authority on art. I, §8, cl 3 and 4 alone.

The Petitioners allege that O.C.G.A. §34-9-265(b)(5) "imposes a severe and punitive burden on the terms of residence for alien workers lawfully in this country who have non-resident alien dependents." (Petition, §III, p. 27). The Petitioners further attack "[t]he statute's imposition of such unequal terms and conditions of employment based upon alienage. . . . " (Petition, §III, p. 28) However, the Petitioners have placed no evidence on the record below that O.C.G.A. §34-9-265(b)(5) has any such effect, as a matter of *fact* rather than suggestion or speculation. Thus, in this respect, the record is not ripe for review by the U.S. Supreme Court. *Pennell v. City of San Jose, supra; cf., Alvarez Martinez v. Industrial Commission of Utah, supra.*

Even without such evidence in the record, however, it is obvious that the Georgia statute does not place a burden on an alien's entrance into this country, his residence within this country, or his opportunity to find employment within this country. Rather, the contrary is true: alien workers might actually be encouraged to bring their dependents to the United States where they will receive *the same* workers' compensation death benefits as the dependents of U.S. and Canadian citizens.

In a case squarely on point, the Utah Supreme Court upheld the validity of a Utah statute which allowed non-resident dependents of aliens one-half the death benefits provided to dependents residing in the United States or Canada. *Alvarez Martinez v. Industrial Commission of the State of Utah, supra.* There, the Utah statute was challenged on four bases, including that it violated the supremacy clause and the plenary power of Congress to regulate immigration and naturalization. Disposing of the supremacy clause issue first, the Utah court found that since the Utah statute did not conflict with any treaty between the United States and Mexico, the supremacy clause was not violated. *Id.*, at 417. Turning last to the issue of Congress' power to regulate immigration and naturalization, the Utah court distinguished *Graham v. Richardson, supra,* since the Arizona and Pennsylvania statutes challenged there (placing durational residency requirements on the receipt by aliens of state welfare benefits) were held to have placed a burden on an alien's entrance into or residence within the United States or on that alien's dependents. *Id.*, at 419. The Utah court held that the Utah statute does not place a burden on any of these persons or interests, noting, as is true on the record here, the claimant's failure to offer any more than mere speculation that the statute being challenged actually placed any burden at all interfering with federal statute or policy.

Thus, the Court is urged to reject the Petitioners' arguments on the supremacy clause issue since it was not raised below, and since the Petitioners have failed to place any evidence on the record that O.C.G.A. §34-9-265(b)(5) places any burden in fact on an alien's entry into or residence within the United States or on an alien's dependents.

IV.

CONCLUSION

For the reasons herein stated, the Petitioners have failed to preserve and obtain ruling upon any federal question, such that any review of this case should be completely denied by this Court. However, assuming that this Court were to review the merits of this case, it is apparent that the Petitioners do not have standing to assert equal protection objections to the challenged statute, pursuant to the United States Constitution. Rather, the Petitioners are nonresident aliens, who may not assert the protections of the equal protection clause. Further, it is apparent that the judgment of the state court below would be affirmed on independent state grounds, in the event that this Court were to review this case, such that only an advisory opinion would issue. Finally, no federal supremacy clause issue has ever been raised at any stage of this litigation, such that no such issue may be considered by this Court. Further, the Petitioners have utterly failed to demonstrate any violation of federal law pursuant to the supremacy clause, by operation of the challenged Georgia statute. For these reasons the Petition for Writ of Certiorari should be denied.

Dated: Decatur, Georgia, October 15, 1993.

Respectfully submitted,

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APPENDIX I

IN THE SUPREME COURT OF THE STATE OF GEORGIA

JOSE A. MORALES, DECEASED EMPLOYEE JULIA CORPUS DE MORALES, WIDOW, JUAN ANTONIO MORALES, AND DANIEL MORALES, MINOR CHILDREN/APPELLEES vs. BARGE-WAGNER [sic], INC., EMPLOYER/APPELLANT and ARGONAUT INSURANCE COMPANY, INSURER/APPELLANT	) SUPREME COURT CIVIL CASE NO.: S93A0252) FULTON COUNTY SUPERIOR COURT CIVIL ACTION FILE NO.: E-03875) STATE BOARD OF WORKERS' COMPENSATION CASE NO.: 451-93-5853

BRIEF OF THE APPELLEES

I. STATEMENT OF THE CASE

This appeal has been docketed pursuant to an application for discretionary review, filed by the Appellants, seeking review by this Court of the judgment of the Superior Court of Fulton County, regarding a constitutional question presented in a workers' compensation claim. On appeal from the award of the State Board of Workers' Compensation, the court below declared O.C.G.A. Section 34-9-3-265(b)(5) to be unconstitutional under Georgia Constitution (1983), Art. I, Section 1, Para.

2, specifically equal protection. Pursuant to O.C.G.A. Section 34-9-265(b)(5), the State Board of Workers' Compensation had directed the Appellants to make payment to the Appellees in an amount limited to $1,000.00. In declaring the statute to be unconstitutional, and in reversing the award of the State Board, the court below directed that the case be remanded to the State Board for reconsideration in light of the Court's order invalidating the limiting statute. The Appellants timely filed their appeal, seeking review of the order of the court below. As this case was docketed in this Court on November 17, 1992, this brief of the Appellees is timely filed.

STATEMENT OF FACTS

There are no factual disputes in this case. Jose Morales, 31, was, on the day of his death, employed as a construction worker by Barge-Wagner Construction Company. On September 19, 1990 he fell 22 stories to his death while in the course of his employment. At the time of his death his wife and two small sons were residing outside the United States in Mexico. The widow and two minor children were wholly dependent on deceased employee's earnings for their support at the time of his death.

O.C.G.A. 34-9-265(b)(2) states:

> The employer shall pay the dependents of the deceased employee, which dependents are wholly dependent on his earnings for support at the time of the injury, a weekly compensation equal to the compensation which is provided for in Code Section 34-9-261 for total incapacity . . .

however, O.C.G.A. 34-9-265(b)(5) provides:

> If the employee leaves dependents who are not citizens or residents of the United States or the Dominion of Canada at the time of the accident, the amount of compensation shall not in any case exceed $1,000.00.

Therefore, as the Widow/Appellee and her two children were neither citizens nor residents at that time, the amount of compensation was limited by the State Board in the amount $1,000.00 pursuant to O.C.G.A. Section 34-9-265(b)(5).

ARGUMENT AND CITATION OF AUTHORITY

The Superior Court of Fulton County was correct in determining O.C.G.A. 34-9-265(b)(5) violates the equal protection clause of the Georgia Constitution. The equal protection clause of the Georgia Constitution provides:

> Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws. Ga. Const. Art. I, Sec. I, Par. 2.

O.C.G.A. 34-9-265(b)(2) provides death benefits for the dependants of a worker who dies in the course of his employment. This Code Section states:

> The employer shall pay the dependents of the deceased employee, which dependents are wholly dependent on his earnings for support at the time of the injury, a weekly compensation equal to the compensation which is provided for in the Code Section 34-9-261 for total incapacity . . .

These death benefits are commensurate to a property right awarded dependent beneficiaries. This property right was created by the State of Georgia itself through its workers' compensation legislation. O.C.G.A. 34-9-265(b)(5) discriminates against non-Canadian non-resident dependents. This code Section states:

> If the employee leaves dependents who are not citizens or residents of the United States or the Dominion of Canadian [sic] at the time of the accident, the amount of compensation shall not in any case exceed $1,000.00.

To deny *certain* non-resident dependents full benefits while at the same time carving out an exception for *other* non-resident dependents is not impartial treatment.

If a Canadian family of a deceased worker wanted to sue the employer for negligence, their case would be barred by the exclusive remedy provision of the workers' compensation act. The family's sole remedy would be death benefits offered under O.C.G.A. 34-9-265(b)(5).

O.C.G.A. 34-9-265(b)(5) also bars a non-resident non-Canadian family from suing the employer yet only provides $1,000.00 in exchange for the taking away of their common law remedy.

This situation created by O.C.G.A. 34-9-265(b)(5) does not offer *equal* protection to *all* non-resident families of deceased workers.

Laws may discriminate in several ways. A law may be discriminatory on its face; by unequal administration, or impermissible motive. Appellees contend O.C.G.A. 34-9-265(b)(5) constitutes discrimination on its face by

creating *two classes* of non-resident dependents, Canadians and others. The two classes of people to be most likely affected by this law are the Canadians and Mexicans as they are most likely to cross the border to find employment. There is absolutely no way to deny ethnic, alienage, and racial differences between Mexicans and Canadians.

The Superior Court of Fulton County determined that a test of "strict scrutiny" should apply to the review of O.C.G.A. 34-9-265(b)(5) and that using this standard of review it failed.

Appellees contend that even if the lesser test of "rational basis" urged by Appellants were used, O.C.G.A. 34-9-265 (b)(5) would fail. As the Florida Supreme Court said in its decision overturning a similar statute in 1989 . . .

> "It is apparent from the face of the statute that it cannot pass a rational basis test, much less the heightened scrutiny applicable when official discrimination occurs based on alienage."
>
> "The $100,000.00 insurance benefit that is available to petitioners in this instance is available to Canadian workers, even in cases where those workers are in this country illegally. What possible state purpose would justify giving a benefit to non-resident Canadians that is denied Mexicans? . . . We can discern no rational basis for the distinction drawn between the northern boarder and the southern one by this statute." *de Ayala, et. al. v. Florida Farm Bureau Casualty Insurance Co., et. al,* 543 S 2d 204(1989). (For the Court's convenience a copy of this decision is attached.)

Appellants in their brief would lead this Court to believe that a majority of other jurisdictions have upheld a similar type of statutory provision limiting benefits in a similar manner as Georgia. This is not true. A survey of all fifty states reveals the following:

> Thirty-Seven (37) states make *no* distinction between dependents residing in the United States and those not residing in the United States.
>
> Four (4) states reduce death benefits to *all* non-resident dependents. 2 of these reduce to 50% the death benefits 1 to 60% of the death benefits. 1 reduces to $750.00 to *all* non-resident dependents.
>
> Six (6) states provide the *same* benefits to non-resident non-Canadian dependents but allow the insurers to pay in a lump sum discounting between 4% and up to sometimes 50% for illegible interest.
>
> Two (2) states provide 50% of the normal death benefits to non-residents non-Canadian dependents.
>
> and of course one (1) state, Georgia, reduces benefits to $1,000.00 to non-resident non-Canadian dependents.

This Court can see that a majority of jurisdictions do *not* have a provision similar to O.C.G.A. 34-9-265(b)(5) in their workers' compensation statutes.

The Appellants go to great lengths to point out that under federal law non-resident aliens are non-persons and have no guarantees under our federal or state constitutions. However, as the Superior Court of Fulton County

found, once a property right *is* created by the State for non-resident aliens these rights should be protected impartially. "The petitioners, non-resident aliens, are being denied equal protection under the Georgia Constitution because they are denied death benefits available to non-resident aliens from Canada."

The Florida Supreme Court in their decision overturning the aforementioned similar statute stated:

> "While the legislature certainly has authority to dictate the mechanism for computing a particular worker's compensation, it may not attach conditions to those computations that discriminate against persons based on constitutionally impermissible grounds. Under both our federal and state constitutions, as well as our common law heritage, all similarly situated person are equal before the law. *de Ayala, et. al. v. Florida Farm Bureau Casualty Insurance Co., et. al.*, 543 S. 2d 204 (1989).

CONCLUSION

For the reasons discussed above, Appellees request the Court affirm the decision of the Superior Court of Fulton County, invalidating O.C.G.A. 34-9-265(b)(5) as violative of the equal protection clause of the Georgia Constitution.

Respectfully submitted the 28th day of December, 1992.

/s/ Bonny Berry Wilder
BONNY BERRY WILDER
Counsel for Employee's
Dependents
Georgia Bar No. 758633

[Petitioners attached as an appendix to their brief to the Supreme Court of Georgia a photocopy of the decision of the Supreme Court of Florida in *De Ayala v. Florida Farm Bureau Casualty Insurance Co., supra.* That appendix has been omitted here.]

APPENDIX II

IN THE SUPREME COURT
STATE OF GEORGIA

JOSE A. MORALES, Deceased /Employee, JULIA CORPUS de MORALES, WIDOW, JUAN ANTONIO MORALES AND DANIEL MORALES, MINOR CHILDREN, v. BARGE-WAGENER, INC., Employer, and ARGONAUT INSURANCE CO., Insurer.	APPLICATION NUMBER: S93A0252 STATE BOARD OF WORKERS' COMPENSATION CLAIM NUMBER: 451-93-5853

APPLICANT'S MOTION FOR RECONSIDERATION

COMES NOW, the widow and minor children of deceased Employee, Jose A. Morales, and file this their Motion for Reconsideration pursuant to Rule 47 of the Supreme Court and shows this Honorable Court as follows:

On May 24, 1993 the Supreme Court of Georgia issued a decision reversing the decision of the Honorable Don A. Langham, Superior Court of Fulton County, in which he found O.C.G.A. §34-9-265(b)(5) violative of the Georgia Constitution.

Accordingly, and within the time period proscribed by Rule 47, Applicants urge this Honorable Court to reconsider its previous decision.

STATEMENT OF THE FACTS

Jose A. Morales plunged 22 stories to his death on September 19, 1990. He left a widow and two young sons who resided in Mexico. The Georgia State Board of Workers' Compensation was obligated to award $1,000.00 in death benefits in accordance to O.C.G.A. §34-9-265(b)(5) which states:

> "If the employee leaves dependents who are not citizens or residents of the United States or the Dominion of Canada at the time of the accident, the amount of compensation shall not in any case exceed $1,000.00."

An appeal was filed in Fulton Superior Court and the Honorable Dan A. Langham, on August 28, 1992 issued an order reversing the Workers' Compensation Board award of $1,000.00. Judge Langham ruled that O.C.G.A. §34-9-265(b)(5) was violative of the Georgia Constitution as "The protection granted by O.C.G.A. §34-9-265(b)(5) is not impartial". He further ruled the right impinged is one which Georgia has held commensurate to a property right. As the law in question has an impact on a "suspect class" dealing with alienage, under the strict scrutiny analysis Judge Langham found O.C.G.A. §34-9-265(b)(5) failed to serve a compelling government objective.

An application for discretionary appeal to the Georgia Supreme Court was then filed by Employer, Barge-Wagener and its Insurer, Argonaut Insurance Company.

ARGUMENT AND CITATION OF AUTHORITY

This Honorable Court determined, and rightly so, that the Workers' Compensation death benefits of Jose A. Morales belong to the dependents. But how did they obtain these benefits? As non-resident aliens they had no innate right to any death benefits *except* those created by the Georgia Legislature in O.C.G.A. §34-9-265(b)(5).

Our legislature created in 1920 a property right for the non-resident non-Canadian dependents of a deceased worker. These families could have been totally excluded. In the 1920's many laws promulgated escaped the scrutiny of equal protection violations.

Our State Constitution in Art.1, §1, ¶2 states: "Protection to person and *property* is the paramount duty of government and shall be impartial and complete." It is the lack of impartiality of O.C.G.a. §34-9-265(b)(5), granting benefits to Canadian non-resident dependents and denying those same benefits to other non-resident dependents that renders it discriminatory, as this Court has found.

However, this Court then drifts in its analysis to the U.S. Constitution and finds this family has no protection under the U.S. Constitution. Rightly so, perhaps as the property right created is *not* a federally legislated property right.

Applicants would argue this Court look no further in its equal protection analysis than the State Constitution of Georgia. The property right was created by the State of

Georgia and should be governed by our State Constitution which declares that protection to person and property shall be *impartial* and complete. Any law promulgated which does not live up to *this* standard should fail upon constitutional challenge.

This decision if it stands creates a situation where unscrupulous employers with dangerous work could purposely hire individuals with families outside of the U.S. or Canada so that in the event an employee dies their liability is limited to $1,000.00. In addition, if a worker is clinging to life, an employer might just decide to delay calling an ambulance as it would be cheaper if the employee dies with liability limited to only $1,000.00.

Certainly, this Court would agree that Canadian dependent families belong to the *same class* as other non U.S. dependent families. *Citizens & S. Nat'l Bank v. Mann*, 234 Ga. 884, 218 S.E.2d 593 (1975). Applicants ask this Court to reconsider its decision which stands for the premise that the State of Georgia *can* discriminate in a lawful manner by bestowing a property right in a capricious and non-uniform manner to a class of similarly situated individuals.

CONCLUSION

Applicants urge each Justice to consider the legality of this admitted discrimination which bestows a property right to a similarly situated class of dependents in a non-uniform and capricious manner which is clearly *not impartial* and thus violative of our State Constitution.

Applicants request the Court reconsider its prior decision and reverse itself.

Respectfully submitted,

/s/ Bonny Berry Wilder
Bonny Berry Wilder
Counsel for Applicants
Georgia Bar No. 758633

MOTION FILED

OCT 18 1993

No. 93-432

In The

Supreme Court of the United States

October Term, 1993

JOSE A. MORALES (Deceased/Employee),
JULIA CORPUS DE MORALES (Widow),
JUAN ANTONIO MORALES and
DANIEL MORALES (Minor Children),

Petitioners,

v.

BARGE-WAGENER CONSTRUCTION
COMPANY (Employer)
and
ARGONAUT INSURANCE COMPANY (Insurer),

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Georgia

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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No. 93-432

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October Term, 1993

JOSE A. MORALES (Deceased/Employee),
JULIA CORPUS DE MORALES (Widow),
JUAN ANTONIO MORALES and
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Petitioners,

v.

BARGE-WAGENER CONSTRUCTION
COMPANY (Employer)
and
ARGONAUT INSURANCE COMPANY (Insurer),

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Georgia

MOTION OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONERS

NOW COMES the National Employment Lawyers Association, and files this motion for leave to file a brief *amicus curiae* in this matter.

The National Employment Lawyers Association (NELA) is a nationwide bar association of approximately 1,700 lawyers who represent the interests of individuals in the workplace. NELA was founded in 1985 to provide assistance to lawyers in protecting the rights of workers who lack the substantially greater resources possessed by employers. NELA is the nation's only professional organization that is exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination, employee benefits, and other employee matters, including workers' compensation claims.

NELA advances and encourages the rights of individual employees through conferences, educational programs, publications, technical support and through legislative and legal activities. NELA has filed *amicus* briefs before in this Court as well as in the Circuit Courts of Appeals and many State Supreme Courts.

NELA is aware of this Court's rule disfavoring *amicus* briefs which are filed without the consent of all parties. NELA has attempted to secure the consent of all parties, but the Respondents, Barge-Wagener Construction Company and Argonaut Insurance Company, have refused to grant their consent. The Petitioners have consented to the filing of this *amicus* brief, and their written consent is on file with the Clerk of this Court.

NELA has prepared this brief and submits it for filing because the issues raised by the petition for certiorari are of such far-reaching public significance that they warrant further briefing and attention. NELA presents a broader perspective than the petitioners, arguing

that the public policy and purpose of workers' compensation statutes in general mandate that *certiorari* be granted and the challenged statute be struck down.

Respectfully submitted,

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

By: _____

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No. 93-432

In The

Supreme Court of the United States

October Term, 1993

JOSE A. MORALES (Deceased/Employee),
JULIA CORPUS DE MORALES (Widow),
JUAN ANTONIO MORALES and
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Petitioners,

v.

BARGE-WAGENER CONSTRUCTION
COMPANY (Employer)
and
ARGONAUT INSURANCE COMPANY (Insurer),

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Georgia

BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

TABLE OF CONTENTS

Page

I. TABLE OF AUTHORITIES ii

II. INTEREST OF THE *AMICUS CURIAE* 1

III. REASONS FOR GRANTING THIS WRIT 2

IV. ARGUMENT 2

A. State courts of last resort are in conflict on important questions of federal law 2

B. The purpose and underlying policy of workers' compensation legislation is to promote economic security for employees and their dependents in exchange for their surrender of common law remedies against their employers 3

1. Our present-day workers' compensation statutes conclusively presume employees are covered 5

2. The essential *quid pro quo* has not taken place where the statute denies benefits to classes of dependents 6

3. The challenged statute makes it cheaper to kill a man than to maim him 8

4. All rights which flow to the dependents flow from the fact of employment 9

V. CONCLUSION 10

I.

TABLE OF AUTHORITIES

Page

CASES:

Barge-Wagener, et al. v. Morales, 263 Ga. 190, 429 S.E. 2d 671 (1993) 10

Califano v. Goldfarb, 430 U.S. 199 (1977) 9

Continental Casualty Company v. Haynie, 51 Ga. App. 650, 181 S.E. 126 (1935) 4

Fox v. Stanish, 150 Ga. App. 537, 258 S.E. 2d 190 (1979), *rev'd on other grounds*, 274 S.E. 2d 327 (1981) 5

Frontiero v. Richardson, 411 U.S. 677 (1973) 9

Labelle v. Lister, 192 Ga. App. 464, 385 S.E. 2d 118 (1989) 5

Madera Company v. Industrial Commission, 262 U.S. 499 (1922) 7

Pedrazza v. Sid Fleming Contractor, Inc., 607 P. 2d 597 (N.M. 1980) 7

Samuel v. Baitcher, 247 Ga. 71, 274 S.E. 2d 327 (1981) 4

Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980) 9

STATUTES:

Official Code of Georgia Annotated 34-9-7 5

Official Code of Georgia Annotated 34-9-11 ..... 5, 6

Official Code of Georgia Annotated 34-9-200 8

Official Code of Georgia Annotated 34-9-261 8

Official Code of Georgia Annotated 34-9-265(b) and (d) 6

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

Comment, *The Workers' Compensation Principle: A Historical Abstract of the Nature of Workers' Compensation*, 9 Hamline Journal of Public Law and Policy 285 (1989) 3

II.

INTEREST OF THE *AMICUS CURIAE*

The National Employment Lawyers Association (NELA) is a nationwide bar association of approximately 1,700 lawyers who represent the rights of individuals in the workplace. NELA was founded in 1985 to protect the rights of employees who lack the substantially greater resources possessed by employers. NELA is the nation's only professional organization that is exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination, employee benefits, and other employee matters, including workers' compensation claims.

NELA advances and encourages the rights of individual employees through conferences, educational programs, publications, technical support and through legislative and legal activities. NELA has filed *amicus* briefs before in this Court as well as in the Circuit Court of Appeals and many State Supreme Courts.

A significant number of NELA's members handle workers' compensation cases on behalf of injured employees. Petitioners seek a ruling on the constitutionality of a statute that denies equal protection to workers whose dependents reside outside the United States or Canada. NELA presents this *amicus* brief to the Court urging the grant of *certiorari* because the underlying purpose of workers' compensation legislation enacted throughout the United States would be subverted if the challenged statute is upheld. NELA is well suited to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

III.

REASONS FOR GRANTING THIS WRIT

A. State courts of last resort are in conflict on important questions of federal law

B. The purpose and underlying policy of workers' compensation legislation is to promote economic security for employees and their dependents in exchange for their surrender of common law remedies against their employers.

1. Our present-day workers' compensation statutes conclusively presume employees are covered.

2. The essential *quid pro quo* has not taken place where the statute denies benefits to classes of dependents.

3. The challenged statute makes it cheaper to kill a man than to maim him.

4. All rights which flow to the dependents flow from the fact of employment.

IV.

ARGUMENT

A. State Courts of last resort are in conflict on important questions of federal law.

This case presents important questions of federal law: whether a Georgia workers' compensation death benefit provision which limits recovery based on alienage violates the Equal Protection Clause and the Supremacy

Clause. The highest courts in six states are divided on these questions. The Supreme Courts of Kansas and Florida have expressly held such provisions to be unconstitutional, while the Georgia Supreme court and the Supreme Courts of New Mexico, Arizona and Utah have upheld the statutes. *Amicus* NELA incorporates by reference the arguments made by the Petitioners in their Petition for Writ of Certiorari in their entirety as they have been so thoroughly presented. *Amicus* NELA presents to the court a broader perspective on the issues and policies underlying workers' compensation legislation and demonstrates how those policies would be subverted by upholding the challenged statute.

B. The purpose and underlying policy of workers' compensation legislation is to promote economic security for employees and their dependents in exchange for their surrender of common law remedies against their employers.

The principle underlying the enactment of workers' compensation legislation in this country at the turn of the century was to provide compensation to the victims of industrial accidents in an efficient, dignified, and certain form. Workers' compensation became necessary as a result of an increase in industrial accidents and common law developments which diminished employer liability for these accidents. Comment, *The Workers' Compensation Principle: A Historical Abstract of the Nature of Workers' Compensation*, 9 Hamline Journal of Public Law and Policy 285, 286 (1989) (hereafter "Historical Abstract"). The inadequacies of the common law cause of action and

remedies available to injured worker demanded a statutory response. The law developed in the United States in response to Compensation Acts enacted in Great Britain and in Germany. The legal relationship between the employer and the employee was restructured in such a revolutionary manner by passage of workers' compensation statutes that it has been called "one of the most significant developments in Anglo-Saxon jurisprudence." Historical Abstract at 292.

Workers' compensation law is a hybrid of tort law and social insurance, as it imposes liability on the employer regardless of fault. Its purpose is to provide financial support and prevent destitution for employees and their families. The right to statutory compensation is earned by the employee and is part of his or her compensation for services rendered. *E.g., Continental Casualty Company v. Haynie,* 51 Ga. App 650, 181 S.E. 126 (1935).

The employee, in exchange for giving up his right to sue his employer for injury, is guaranteed certain benefits depending on the extent of injury or disability. The employer benefits from the arrangement as it is able to calculate more accurately the cost of doing business, being freed from the cost and unpredictability of tort suits by its employees for injuries sustained on the job. *E.g., Samuel v. Baitcher,* 247 Ga. 71, 274 S.E. 2d 327 (1981). Society realizes a reduction in unnecessary and expensive litigation, relief from the financial burden of supporting injured workers and their dependents, and the increased incentives to prevent industrial accidents by the implementation of upgraded safety equipment and procedures. *Historical Abstract* at 295.

1. Our present-day workers' compensation statutes conclusively presume employees are covered.

An important element of workers' compensation legislation is its universal coverage. In Georgia, for example, all employees are presumed to be covered and subject to the workers' compensation legislation. O.C.G.A. § 34-9-7 provides that "Every contract of service between an employer and an employee covered by this chapter, whether such contract is written, oral, or implied, shall be presumed to have been made subject to this chapter [workers' compensation law] . . . ". *Fox v. Stanish*, 150 Ga. App. 537, 258 S.E. 2d 190 (1979), *rev'd on other grounds*, 274 S.E. 2d 327 (1981) (conclusive presumption of coverage).

In exchange for providing coverage to all employees, workers' compensation statutes provide the exclusive remedy for the injured employee. Tort actions against the employer are automatically barred, limiting the injured employee and his dependents to the remedies provided in the workers' compensation statute. The Georgia bar to tort suits is found in O.C.G.A. § 34-9-11, which provides in pertinent part: "The rights and remedies granted to an employee by this chapter shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents, or next of kin, at common law or otherwise, on account of such injury, loss of service, or death . . . ". This *quid pro quo*, whereby the employee receives statutory protection in exchange for giving up his right to sue, is intended to benefit all involved. *Labelle v. Lister*, 192 Ga. App 464, 385 S.E. 2d 118 (1989).

2. The essential *quid pro quo* has not taken place where the statute denies benefits to classes of dependents.

The challenged statute, O.C.G.A. § 34-9-265(b)(5), limits the recovery of death benefits to employees whose dependents reside outside the United States or Canada to a maximum of $1,000. In contrast, employees whose dependents reside in the United States or Canada may receive virtually unlimited benefits.[1] If the statute is upheld in the face of the Petitioners' constitutional challenge, these non-resident dependents will receive a total compensation of $1,000 for the death of their husband and father upon whom they were totally dependent for their support. They are precluded from suing the employer for its negligence in causing the employee's death by operation of the statutory bar, O.C.G.A. §34-9-11, *supra*. In exchange for the sum of $1,000 they have forfeited their common law right to sue. *Amicus* NELA submits that this amounts to no exchange whatsoever, given that $1,000 is no substitute for the loss of life and lost earning power of the decedent.

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[1] While the statute caps the benefits for a worker survived only by a dependent spouse to a maximum of $100,000 (O.C.G.A. § 34-9-265 (d)), benefits up to $250 per week continue for children through the age of majority or graduation from high school so that these benefits could equal $234,000 over 18 years; or if the child attends college full time, through age 22, totalling $286,000 over 22 years; or if disabled from working, the child could recover a lifetime of benefits totalling $845,000 through age 65.

This Court has recognized, in one of its earliest decisions addressing workers' compensation statutes, *Madera Company v. Industrial Commission*, 262 U.S. 499 (1922), that these statutes are designed to replace the lost earning power of the employee for those who are dependent upon him, whether they be residents or non-residents. *Madera*, 262 U.S. at 503. The *Madera* decision upheld a California workers' compensation law requiring payment of death benefits to non-resident aliens against a due process challenge by the employer. In upholding the California statute, the Court expressly held that employees were not any "less protected if their beneficiaries happened to live abroad". *Madera*, 262 U.S. at 504.

In examining a statutory provision similar to Georgia's, one court found that no *quid pro quo* had taken place where non-resident dependents were barred by statute from recovering any death benefits. *Pedrazza v. Sid Fleming Contractor, Inc.*, 607 P.2d 597, 601 (N.M. 1980). *Pedrazza* rejected the challenge to the New Mexico statute which denied benefits but permitted the dependents to pursue other avenues of recovery, through a tort action against the employer. While an understandable result was achieved by the New Mexico court, the impact of the *Pedrazza* holding subverts the entire purpose of the workers' compensation statutes, which is to eliminate litigation and provide the worker or his dependents with support. Permitting the non-resident alien dependents to sue subjects the employer to the uncertainty of a lawsuit, bogs the courts down with litigation, and fails to protect workers. *Amicus* NELA believes that such a result would introduce chaos into an orderly and effective system, and

can be avoided by granting the petition and striking down the statute on the grounds urged by Petitioners.

3. The challenged statutes makes it cheaper to kill a man than to maim him.

Under the challenged statute, if an employee with non-resident dependents dies on the job he is deprived of the full benefit of the exchange of his right to sue for the "protection" of the workers' compensation statutes. If, however, he is injured or disabled on the job, he would be entitled to the same benefits as his co-workers. For example, if the decedent in the case at bar had been injured instead of killed, his employer would have been required to furnish medical care reasonably necessary to effect a cure and restore the employee to suitable employment. O.C.G.A. § 34-9-200.

In addition to medical care, the injured employee receives a portion of his weekly wages, the amount depending on the severity of the injury. If an employee is "totally temporarily disabled", the benefit is two-thirds of the employees' average weekly wage, but not more than $250.00/week. O.C.G.A. § 34-9-261. This benefit can be paid for a maximum of 400 weeks, which means that the decedent could have received $100,000 towards the support of his dependents had he only been temporarily disabled instead of killed. This anomalous result breathes new life into the common law truism that "it is cheaper to kill a man than to maim him". Such a result flies in the face of modern constitutional norms of due process, and should not be upheld.

4. All rights which flow to the dependents are contingent on the fact of employment.

It is the decedent's employment that entitles his dependents to benefits. The benefits are afforded *to the worker* in exchange for giving up his right to seek redress for injuries on the job, and flow through him to his dependents. The benefits arise out of the employment relationship and are earned by the worker before injury or death. The benefits to which the decedents' dependents are entitled are not merely the largesse of some social program, they are earned by the labor of the decedent. Failure to recognize that his labor was exchanged for wages and for workers' compensation benefits in the event of his injury or death is the fundamental flaw in the opinion of the Georgia Supreme Court. The decedent worked, paid taxes, and was subjected to the same work-related risks as his co-workers. He and his dependents should receive the same benefits as his co-workers. *See, e.g. Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980); *Califano v. Goldfarb*, 430 U.S. 199 (1977); and *Frontiero v. Richardson*, 411 U.S. 677 (1973).

Unfortunately for the decedent and his family, under the Georgia statute at issue, his death meant an untimely and absolute loss of all support for his family. If this statute is upheld, persons who have been legally admitted to the United States and whose labor has contributed significantly to the economic well-being of our nation will not be treated as equal members of the community. Despite being similarly situated and making equal contributions they will receive less protection from laws which were enacted to benefit all workers.

As noted by Justice Benham in his dissent to the Georgia Supreme Court's opinion, workers such as these "wear a badge of inferiority". *Barge-Wagener v. Morales*, 263 Ga. 190, 429 S.E. 2d 671 (1993). A ruling upholding the challenged statute would undoubtedly result in unequal treatment in the workplace. It could encourage Georgia employers to hire alien workers for high-risk jobs, with the knowledge that if they should be killed in a work-related accident, only $1,000 would be owed to their non-resident dependents. Both constitutional and policy reasons dictate that these benefits be awarded to the dependents of workers on an equal basis.

V.

CONCLUSION

For these reasons the petition should be granted and the judgment of the Georgia Supreme Court should be reversed.

Dated: Atlanta, Georgia, October 18, 1993.

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IN THE
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OCTOBER TERM, 1993

JOSE ANTONIO MORALES, *et al.*,
Petitioners,
v.
BARGE-WAGENER CONSTRUCTION CO., *et al.*,
Respondents.

On Petition for Writ of Certiorari from the Supreme Court of Georgia

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF UNITED STATES OF MEXICO, LEAGUE OF UNITED LATIN AMERICAN CITIZENS AND MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-342

JOSE ANTONIO MORALES, *et al.*,
Petitioners,

v.

BARGE-WAGENER CONSTRUCTION CO., *et al.*,
Respondents.

On Petition for Writ of Certiorari from the Supreme Court of Georgia

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The above amici move pursuant to Rule 37.2 of the Rules of this Court for leave to file the attached brief amicus curiae in support of the petition for Writ of Certiorari. Petitioners have consented to the filing of this brief (consent letter has been filed with the clerk of this Court), but Respondents have withheld their consent. Amici recognize that the Court's Rules disfavor unconsented amici briefs, but because the matter raised by the Petitioners' Writ of Certiorari petition affects primarily Mexican legal immigrants to the United States, amici are compelled to file. The amici joining in this motion represent the Mexican population who legally immigrate to the United States and are directly affected by similar workers' compensation statutes.

Wherefore, the United States of Mexico, the League of United Latin American Citizens, and the Mexican American Legal Defense and Educational Fund request that this Court grant leave to file the accompanying amicus curiae brief in support of the granting of Petitioners' Writ of Certiorari.

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QUESTIONS PRESENTED FOR REVIEW

1. Can Georgia, within the confines of the Equal Protection Clause of the Fourteenth Amendment, discriminate against nonresident aliens/dependents in the dispensation of death benefits under its workers' compensation statute.

2. Does the equal protection clause forbid Georgia from paying Canadian citizens or residents/dependents substantially more death benefits than all other nonresident aliens/dependents under its Workers' Compensation Act.

3. Does Georgia's Workers' Compensation Act, by favoring Canadian residents or citizens with death benefits that far exceed the death benefits received by residents or citizens from other countries, create an impermissible and unconstitutional intrusion by Georgia into the field of foreign relations.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	2
REASONS FOR GRANTING THE WRIT	4
I. THE DECISION BELOW PRESENTS AN IMPORTANT EQUAL PROTECTION QUESTION UNDER THE FOURTEENTH AMENDMENT CONCERNING THE CONSTITUTIONALITY OF STATE DISCRIMINATION AGAINST NONRESIDENT ALIENS	4
II. THE DECISION BELOW MISCONSTRUES THE REACH OF THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE AS IT RELATES TO DISTINCTIONS MADE WITHIN A CLASS OF NONRESIDENT ALIENS ON THE BASIS OF ALIENAGE AND NATIONAL ORIGIN	7
III. THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION CONCERNING THE CONSTITUTIONALITY OF A STATE'S WORKERS' COMPENSATION ACT WHICH, BY MAKING DISTINCTIONS BASED UPON ALIENAGE AND NATIONAL ORIGIN, INSERTS THAT STATE INTO THE SPHERE OF FOREIGN AFFAIRS THAT IS EXCLUSIVE TO THE FEDERAL GOVERNMENT	15
CONCLUSION	20

TABLE OF AUTHORITIES

CASES Page

Alegria v. United States, 945 F.2d 1523 (11th Cir. 1991) 7, 13
Alexander Ranch, Inc. v. Central Appraisal Dist. of Erath County, 733 S.W.2d 303 (Tex. 1987), *cert. denied*, 486 U.S. 1026, 100 L. Ed. 2d 236, 108 S. Ct. 2005 (1988) 8, 13, 14
Alvarez Martinez v. Industrial Comm'n of Utah, 720 P.2d 416 (Utah 1986) 5
Arizona v. Hicks, 480 U.S. 321, 94 L. Ed. 2d 347, 107 S. Ct. 1149 (1987) 18
Barbier v. Connolly, 113 U.S. 27, 28 L. Ed. 923, 5 S. Ct. 357 (1884) 9
Barge-Wagener Constr. Co. v. Morales, 263 Ga. 190, 429 S.E.2d 671 (1993) ..... *passim*
Cabell v. Chavez-Salido, 454 U.S. 432, 70 L. E. 2d 677, 102 S. Ct. 735 (1982) 9
Califano v. Goldfarb, 430 U.S. 199, 51 L. Ed. 2d 270, 97 S. Ct. 1021 (1977) 6
Chae Chan Ping v. United States ("Chinese Exclusion Case"), 130 U.S. 581, 32 L. d. 1068, 9 S. Ct. 623 (1888) 16
Clark v. Allen, 331 U.S. 503, 91 L. Ed. 1633, 67 S. Ct. 1431 (1947) 15, 17
De Ayala v. Florida Farm Bureau Casualty Ins. Co., 543 So. 2d 204 (Fla. 1989) 5
Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1856) 6
F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 64 L. Ed. 989, 40 S. Ct. 560 (1920) 9
Frontiero v. Richardson, 411 U.S. 677, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973) 9
Garzon v. United States, 605 F. Supp. 738 (S.D. Fla. 1985) ..... *passim*
Graham v. Richardson, 403 U.S. 365, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1971) ..... *passim*
Hampton v. Mow Sun Wong, 426 U.S. 88, 48 L. Ed. 2d 495, 96 S. Ct. 1895 (1976) 9, 10
Hillsborough Township v. Cromwell, 326 U.S. 620, 90 L. Ed. 358, 66 S. Ct. 445 (1946) 13

TABLE OF AUTHORITIES—Continued

	Page
Hines v. Davidowitz, 312 U.S. 52, 85 L. Ed. 581, 61 S. Ct. 399 (1941)	*passim*
Hooper v. Bernalillo County Assessor, 472 U.S. 612, 86 L. Ed. 2d 487, 105 S. Ct. 2962 (1985)	10
In Re Alien Children Educ. Litig., 501 F. Supp. 544 (S.D. Tex. 1980), *aff'd sub nom. Plyler v. Doe*, 457 U.S. 202, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982)	9
Jalifi v. Industrial Comm'n of Ariz., 132 Ariz. 233, 644 P.2d 1319, *cert. dismissed*, 459 U.S. 899, 74 L. Ed. 2d 161, 103 S. Ct. 200 (1982)	5
Johnson v. Eisenstrager, 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936 (1950)	12
Jurado v. Popejoy Constr. Co., 253 Kan. 116, 853 P.2d 669 (1993)	5
Korematsu v. United States, 323 U.S. 214, 89 L. Ed. 194, 65 S. Ct. 193 (1944)	14
Lehndorff Geneva, Inc. v. Warren, 74 Wis. 2d 369, 246 N.W.2d 815 (1976)	8, 13, 14
Lindholm v. United States, 808 F. Supp. 7 (D.D.C. 1992)	7, 13
Madera v. Insurance Accident Comm'n, 262 U.S. 499, 67 L. Ed. 1091, 43 S. Ct. 604 (1923)	6
Michigan v. Long, 463 U.S. 1032, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983)	2
Olmstead v. United States, 277 U.S. 438, 72 L. Ed. 944, 48 S. Ct. 564 (1928)	19
Pedrazza v. Sid Fleming Contractor, Inc., 94 N.M. 59, 607 P.2d 597 (1980)	5, 6
Peña v. Industrial Comm'n, 140 Ariz. 510, 683 P.2d 309 (1984)	5
Plyler v. Doe, 457 U.S. 202, 72 L. Ed 2d 786, 102 S. Ct. 2382 (1982)	*passim*
Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978)	9
Rostker v. Goldberg, 453 U.S. 57, 69 L. Ed. 2d 478, 101 S. Ct. 2646 (1981)	9
Russian Volunteer Fleet v. United States, 282 U.S. 481, 75 L. Ed. 473, 51 S. Ct. 229 (1931)	7
Sailer v. Tonkin, 356 F. Supp. 72 (V.I. 1973)	14

TABLE OF AUTHORITIES—Continued

	Page
Shames v. Nebraska, 323 F. Supp. 1321 (D. Neb. 1971), *aff'd*, 408 U.S. 301, 33 L. Ed. 2d 321, 92 S. Ct. 2478 (1972)	17
Stebco, Inc. v. United States, 733 F. Supp. 1387 (S.D. Cal.), *appeal dismissed*, 939 F.2d 686 (9th Cir. 1990)	7, 13
Sugarman v. Dougall, 413 U.S. 634, 37 L. Ed. 2d 853, 93 S. Ct. 2842 (1973)	10, 14
Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 92 L. Ed. 1478, 68 S. Ct. 1138 (1948)	10, 11
Tayyari v. New Mexico State Univ., 495 F. Supp. 1365 (D.N.M. 1980)	14
Town of Ball v. Rapides Parish Policy Jury, 746 F.2d 1049 (5th Cir. 1984)	10
Truax v. Raich, 239 U.S. 33, 60 L. Ed. 131, 36 S. Ct. 7 (1915)	11
United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 81 L. Ed. 255, 57 S. Ct. 216 (1936)	19
United States v. Verdugo-Urquidez, 494 U.S. 259, 108 L. Ed. 2d 222, 110 S. Ct. 1056 (1990)	12
Weinberger, v. Weisenfeld, 420 U.S. 636, 43 L. Ed. 2d 514, 95 S. Ct. 1225 (1975)	6
Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 64 L. Ed. 2d 107, 100 S. Ct. 1540 (1980)	6
Yick Wo v. Hopkins, 118 U.S. 356, 30 L. Ed. 220, 6 S. Ct. 1064 (1886)	10, 11
Zobel v. Williams, 457 U.S. 55, 72 L. Ed. 2d 672, 102 S. Ct. 2309 (1982)	10
Zschernig v. Miller, 389 U.S. 429, 19 L. Ed. 2d 683, 88 S. Ct. 664 (1968)	*passim*

CONSTITUTIONAL AND STATUTORY AUTHORITY

U.S. Const. amend. XIV, § 1	2
U.S. Const. art. I, § 2, cl. 2	16
U.S. Const. art. I, § 8, cl. 11	16
U.S. Const. art. I, § 8, cl. 12	16
U.S. Const. art. I, § 10, cl. 1	2
U.S. Const. art. I, § 10, cl. 3	2, 19
U.S. Const. art. II, § 2, cl. 1	16

TABLE OF AUTHORITIES—Continued

	Page
U.S. Const. art. I, § 10, cl. 8	16
28 U.S.C. § 1257(a) (1988)	2
Ga. Code Ann. § 34-9-261 (Michie 1993)	4
Ga. Code Ann. § 34-9-265(b)(3) (Michie 1993)	4
Ga. Code Ann. § 34-9-265(b)(5) (Michie 1993)	2, 4, 5, 14
Ga. Code Ann. § 34-9-265(d) (Michie 1993)	4
1920 Ga. Laws 814	10
Or. Rev. Stat. § 111.070 (1957)	17
MISCELLANEOUS	
Aristotle, *Ethica Nicomachea* V.3.1131-1131b (W. Ross trans. 1925)	8
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Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding?*, 2 Stan. L. Rev. 5 (1949)	12
Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Colum. L. Rev. 131 (1950)	12
Gerald L. Neuman, *Whose Constitution?*, 100 Yale L.J. 909 (1991)	7
H. Kelsen, *Aristotle's Doctrine of Justice in What Is Justice?* 110, 127-28 (1957)	8
John Higham, *Strangers in the Land* 158-334 (1967)	11
Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341 (1949)	8
K. Marc-Wogau, *Aristotle's Theory of Corrective Justice and Reciprocity in Philosophical Essays* 21 (1967)	8
Kevin P. Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 Tul. L. Rev. 469 (1987)	17

TABLE OF AUTHORITIES—Continued

	Page
Paul Enrlich, *The Golden Door* 129-135 (1979)	11
Paul Savoy, *The Spiritual Nature of Equality: Natural Principles of Constitutional Law*, 28 How. L.J. 809 (1985)	8
Ricardo Romo, *East Los Angeles: History of a Barrio* 91-110 (1983)	11
Roger Daniels, *Coming to America* 246, 307, 333, 365-84 (1990)	11
Sri Aurobbindo, *The Human Cycle* 197 (A. Ghose trans. 1971)	8
Symposium, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. Pitt. L. Rev. 237 (1983)	13
Symposium, *Due Process and Membership in National Community: Political Asylum and Beyond*, 44 U. Pitt. L. Rev. 165 (1983)	12, 13
The Federalist No. 42 (James Madison)	16, 18
U.S. Printing Office, *North American Free Trade Agreement* (1993)	6
W. Hardie, *Aristotle's Ethical Theory* 189 (2d ed. 1980)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-342

JOSE ANTONIO MORALES, *et al.*,
Petitioners,

v.

BARGE-WAGENER CONSTRUCTION CO., *et al.*,
Respondents.

On Petition for Writ of Certiorari from the Supreme Court of Georgia

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BRIEF AMICUS CURIAE OF UNITED STATES OF MEXICO, LEAGUE OF UNITED LATIN AMERICAN CITIZENS AND MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

OPINION BELOW

The opinion of the Supreme Court of Georgia on the merits and reversing the trial court has been reported at 263 Ga. 190, 429 S.E.2d 671 (1993).

JURISDICTION

The judgment of the Supreme Court of Georgia was enacted on May 24, 1993, and a petition for reconsideration was denied on June 18, 1993.

While the opinion of the court below makes reference to the Georgia Constitution, it does not provide adequate and independent state grounds for its decision. *Michigan v. Long*, 463 U.S. 1032, 1040-41, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983). Therefore, the jurisdiction of this Court is invoked by 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV, § 1:

> ". . . nor shall any state . . . deny any person within its jurisdiction the equal protection of the laws."

U.S. Const. art. I, § 10, cl. 1:

> "No State shall enter any Treaty, Alliance, or Confederation . . ."

U.S. Const. art. I, § 10, cl. 3:

> "No State shall, without the consent of Congress, . . . enter into any Agreement or Compact with a foreign Power . . ."

Ga. Code Ann. § 34-9-265(b)(5) (Michie 1993):

> (b) If death results instantly from an accident arising out of and in the course of employment . . . the compensation under this chapter shall be as follows:
>
> . . .
>
> (5) If the employee leaves dependents who are *not citizens or residents of the United States or the Dominion of Canada* at the time of the accident, the amount of compensation shall not in any case exceed $1,000.00.

INTEREST OF AMICUS CURIAE

The United States of Mexico, is a federal republic, located immediately South of the United States. The interest of the United States of Mexico is based on the fact that a continuous flow of people from one side of our common border to the other has existed since before Columbus. In recent years, immigration North from Mexico has increased substantially, drawn by guest worker

programs and other job opportunities. Many of these workers leave their families in Mexico while they work in the United States. Consequently, Mexican citizens constitute a significant number of the individuals that are severely impacted by the laws similar to the Georgia Workers' Compensation Act.

The League of the United Latin American Citizens ("LULAC") is a national membership organization originally chartered in 1929. Its objectives are to protect and defend the civil rights of all Americans, and to improve the quality of life for all Americans. During the course of its sixty-four (64) year history, LULAC has often appeared as plaintiff or amicus in litigation before this Court and in many other federal and state courts to vindicate the rights of minorities, particularly Hispanics, who are denied the full enjoyment of their constitutional rights.

Many LULAC members who reside and work in the United States are not citizens of the United States or Canada. Some of them have dependent families who do not reside in the United States or Canada, and consequently would be victims of discrimination from state laws similar to Georgia Workers' Compensation Act.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national non-profit civil rights organization established in 1967. Its principal objective is to secure the civil rights of Latinos in the United States through litigation and education. It has frequently represented plaintiffs in civil rights and equal protection matters and appeared as *amicus curiae* before this Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW PRESENTS AN IMPORTANT EQUAL PROTECTION QUESTION UNDER THE FOURTEENTH AMENDMENT CONCERNING THE CONSTITUTIONALITY OF STATE DISCRIMINATION AGAINST NONRESIDENT ALIENS

Jose Morales, age thirty-one, was a resident alien from Mexico who was employed as a construction worker by Barge-Wagener Construction Company in Georgia when he fell twenty-two stories to his death from a building on which he was working. He is survived by his wife and two minor children, all of whom are citizens and residents of Mexico. His wife and children were awarded the maximum lump sum of $1,000.00, pursuant to Ga. Code Ann. § 34-9-265(b)(5) (Michie 1993), instead of being eligible for death benefits at least ten times this amount.[1] If, however, Ms. Moraies and her children had resided in Canada instead of Mexico, she would have been entitled to full benefits. Interestingly, had Ms. Morales and her children been Canadian citizens residing in Mexico at the same address, she would have been entitled to full benefits. Ironically, if Ms. Morales had been living in the United States illegally, she would have been entitled to full benefits.[2]

The substantial nature of the issues raised by Ms. Morales in this appeal is evident by the sharp disagreement amongst the members of the Georgia Supreme Court. The majority held that the death benefits provided pursuant to Ga. Code Ann. § 34-9-265(b)(5) (Michie 1993) created a right solely in the dependents. Moreover, even though the Georgia statute was acknowledged to be discriminatory because the benefits were substan-

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[1] Ga. Code Ann. §§ 34-9-261, 34-9-265(b)(3) and (5), 34-9-265(d) (Michie 1993) also allows United States citizens to receive the $100,000.00 death benefit, but that is not the subject of comparison.

[2] Dependents of legally immigrated residents from Mexico currently must wait a minimum of three years before becoming eligible for legal residency in the United States. Bureau of Consular Affairs, U.S. Dept. of State, No. 28, Visa Bulletin (1993).

tially less, the Court ruled that these nonresident aliens/dependents are not protected by the Fourteenth Amendment because they were not within the reach of the Constitution. Two other justices, in a vigorous and persuasive dissent, found that the majority's "artful" opinion—that the death benefits created a right solely in the dependents—was without foundation. *Barge-Wagener Constr. Co. v. Morales*, 263 Ga. 190, 429 S.E.2d 671, 674 (1993) (Benham, J., dissenting).[3]

The court below realized that, if the dependents were able to raise the resident alien's constitutional rights, it would not only have to confront the Fourteenth Amendment's Equal Protection Clause, but also the statute would be subject to a higher level of scrutiny. Therefore, by shifting its constitutional analysis away from the deceased resident alien, to his wife and children, all of whom were nonresident aliens, the Georgia Supreme Court avoided the equal protection analysis and the heavy burden it carries in justifying discrimination between similarly situated persons.

The urgency of this issue has grown in importance since the last time the Court was presented with a somewhat similar issue in *Jalifi v. Industrial Comm'n of Ariz.*, 132 Ariz. 233, 644 P.2d 1319, *cert. dismissed*, 459 U.S. 899, 74 L. Ed. 2d 161, 103 S. Ct. 200 (1982). After *Jalifi*, several states have addressed the issue without reaching a consensus and no predominate judicial viewpoint has emerged or appears to be emerging. *See Jurado v. Popejoy Constr. Co.*, 253 Kan. 116, 853 P.2d 669 (1993) (applying equal protection); *De Ayala v. Florida Farm Bureau Casualty Ins. Co.*, 543 So. 2d 204 (Fla. 1989) (applying equal protection); *Alvarez Martinez v. Industrial Comm'n of Utah*, 720 P.2d 416 (Utah 1986) (refusing to apply equal protection); *Peña v. Industrial Comm'n*, 140 Ariz. 510, 683 P.2d 309 (1984) (refusing to apply equal protection); *Pedrazza v. Sid Fleming Contractor, Inc.*, 94 N.M.

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[3] The dissent concluded that the majority's analogy to the Wrongful Death statute was fatally flawed. *Barge-Wagener Constr. Co. v. Morales*, 263 Ga. 190, 429 S.E.2d at 675 (1993).

59, 607 P.2d 597 (1980) (refusing to apply equal protection). Indeed, the Georgia Supreme Court has added to the confusion by failing to provide the proper framework for analyzing the equal protection clause. And, there is no indication that this issue will be resolved in the foreseeable future in the absence of a decision by this Court. To nonresident aliens, particularly with the possible emergence of the *North American Free Trade Agreement ("NAFTA")*, this question presents perhaps the most important issue in the evolution of equal protection jurisprudence. U.S. Printing Office, *North American Free Trade Agreement* (1993).

Because the Georgia Supreme Court determined that the death benefits accrued exclusively to the benefit of the survivors, one is forced to focus on the rights of the nonresident alien dependent.[4] When this Court was confronted with the same type of dependent discrimination in the context of gender issues, this Court's analytical framework was from the perspective of the employee, not the dependent. *See, e.g., Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 64 L. Ed. 2d 107, 100 S. Ct. 1540 (1980); *Weinberger v. Weisenfeld*, 420 U.S. 636, 43 L. Ed. 2d 514, 95 S. Ct. 1225 (1975). The Petitioners more than adequately address this point in their brief. Amici would like, however, to direct this Court's attention to the premise underlying the Georgia Supreme Court decision—that nonresident aliens are "persons" without constitutional rights that a state is "bound to respect". *Dred Scott v Sanford*, 60 U.S. (19 How.) 393, 407, 15 L. Ed. 691 (1856).

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[4] *See Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 64 L. Ed. 2d 107, 100 S. Ct. 1540 (1980) (discussing gender discrimination in workers' compensation statute); *Califano v. Goldfarb*, 430 U.S. 199, 51 L. Ed. 2d 270, 97 S. Ct. 1021 (1977) (discussing gender discrimination in Federal Old-Age, Survivors, and Disability Insurance Program); *Weinberger v. Weisenfeld*, 420 U.S. 636, 43 L. Ed. 2d 514, 95 S. Ct. 1225 (1975) (examining gender discrimination in Social Security Act); *Madera v. Insurance Accident Comm'n*, 262 U.S. 499, 67 L. Ed. 1091, 43 S. Ct. 604 (1923) (exploring discrimination against employer by workers' compensation statute).

II. THE DECISION BELOW MISCONSTRUES THE REACH OF THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE AS IT RELATES TO DISTINCTIONS MADE WITHIN A CLASS OF NONRESIDENT ALIENS ON THE BASIS OF ALIENAGE AND NATIONAL ORIGIN

This case presents an issue of exceptional importance that should be decided by this Court, since it has never considered the full extent of how the Fourteenth Amendment's Equal Protection Clause applies to nonresident aliens. Indeed, because this Court has not established the parameters by which the equal protection clause applies to nonresident aliens, the Georgia Supreme Court was able to "artful[ly]" exploit this constitutional vacuum. At the heart of the decision in the court below is that nonresident aliens, regardless of the circumstances, do not possess constitutionally protected rights.[5] This Court has, however, held that nonresident aliens do, under certain circumstances, have a constitutionally protected status under the United States Constitution that must be respected by states. *See, e.g., Russian Volunteer Fleet v. United States*, 282 U.S. 481, 75 L. Ed. 473, 51 S. Ct. 229 (1931). Some lower federal courts have said that nonresident aliens, under certain circumstances, do possess constitutional protected rights under the Fourteenth Amendment's Equal Protection Clause. *See, e.g., Alegria v. United States*, 945 F.2d 1523 (11th Cir. 1991); *Lindholm v. United States*, 808 F. Supp. 7 (D.D.C. 1992); *Stebco, Inc. v. United States*, 733 F. Supp. 1387 (S.D. Cal.), *appeal dismissed*, 939 F.2d 686 (9th Cir. 1990); *Garzon*

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[5] The issue raised by the Georgia Supreme Court brings into focus two questions that are basic to the tenets of constitutional law: (i) the domain of American constitutionalism and (ii) the concept of constitutional equality. *See* Gerald L. Neuman, *Whose Constitution?*, 100 Yale L.J. 909 (1991). Professor Neuman stresses the realization that, as our country has developed, the preferred application of the Constitution has evolved from a strict social contract approach, applying constitutional protections only to United States citizens, into an expanding municipal law approach which extends the Constitution to those who are affected by the laws of the United States. *Id.*

v. United States, 605 F. Supp. 738 (S.D. Fla. 1985). And, the Wisconsin and Texas Supreme Courts have found that, under certain circumstances, nonresident aliens do possess rights under the Fourteenth Amendment's Equal Protection Clause. *See, e.g., Alexander Ranch, Inc. v. Central Appraisal Dist. of Erath County*, 733 S.W.2d 303 (Tex. 1987), *cert. denied*, 486 U.S. 1026, 100 L. Ed. 2d 236, 108 S. Ct. 2005 (1988); *Lehndorff Geneva, Inc. v. Warren*, 74 Wis. 2d 369, 246 N.W.2d 815 (1976). The Georgia Supreme Court's decision simply cannot be reconciled with the decisions above.

When Georgia created a distinction between Canadians and other nonresident aliens within its Workers' Compensation Act, it challenged one of the most "common idea[s] of equality that [span] the political philosophy of [both] East and West." Paul Savoy, *The Spiritual Nature of Equality: Natural Principles of Constitutional Law*, 28 How. L.J. 809, 836-37 (1985).[6] As Professors Tussman & tenBroek stated:

> The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be treated similarly.

Joseph Tussman & Jacobs tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341 (1949). This is the concept of "equality" that was understood by the drafters of the Fourteenth Amendment.[7] And indeed,

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[6] See also Aristotle, *Ethica Nicomachea* V.3.1131-1131b (W. Ross trans. 1925) ("Equality in morals means this: things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness."); Aristotle, *Metaphysicai* 5.1055b-1056b (W. Ross trans. 2d ed. 1928); W. Hardie, *Aristotle's Ethical Theory* 189 (2d ed. 1980); H. Kelsen, *Aristotle's Doctrine of Justice in What Is Justice?* 110, 127-28 (1957); K. Marc-Wogau, *Aristotle's Theory of Corrective Justice and Reciprocity in Philosophical Essays* 21 (1967); Sri Aurobbindo, *The Human Cycle* 197 (A. Ghose trans. 1971).

[7] Cong. Globe, 39th Cong., 1st Sess. 342-43 (1866).

members of this Court, whose views are otherwise as diverse as former Justice Brennan,[8] and Justices Blackmum [9] and Rehnquist,[10] agree that those who are similarly situated should be treated similarly. Since 1885, this Court has established this standard as a part of equal protection jurisprudence. *See Barbier v. Connolly*, 113 U.S. 27, 28 L. Ed. 923, 5 S. Ct. 357 (1884); *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 556 (S.D. Tex. 1980), *aff'd sub nom. Plyler v. Doe*, 457 U.S. 202, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982). The question presented by both the Georgia Supreme Court's decision and Georgia's workers' compensation classification is simply whether a state government can legitimately discriminate between similarly situated individuals on the basis of alienage and national origin.[11]

This case does not compare United States citizens to nonresident aliens, United States citizens to resident aliens, nor resident aliens to nonresident aliens in the United States. Moreover, Amici do not attempt to convince the Court that nonresident aliens have the full complement of constitutional rights possessed by either resident aliens or United States citizens.[12]

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[8] *Plyler v. Doe*, 457 U.S. 202, 216, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982) (per Brennan, J.) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 64 L. Ed. 989, 40 S. Ct. 560 (1920)); *Frontiero v. Richardson*, 411 U.S. 677, 683, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973) (per Brennan, J.).

[9] *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) (concurring and dissenting opinion).

[10] *Rostker v. Goldberg*, 453 U.S. 57, 64, 69 L. Ed. 2d 478, 101 S. Ct. 2646 (1981) (per Rehnquist, J.).

[11] The Georgia statute discriminates both on the basis of alienage and national origin. The statute draws its initial distinction between nonresident aliens on one hand and resident aliens and United States citizens on the other. The statute then further distinguishes on the grounds of national origin to favor Canadian nonresident aliens over those of every other nationality.

[12] The equal protection questions presented to the Court to date deal primarily with the issue of resident aliens. *Cabell v. Chavez-Salido*, 454 U.S. 432, 70 L. Ed. 2d 677, 102 S. Ct. 735 (1982); *Hamp-*

Here Georgia, by granting benefits to nonresident aliens, discriminates against a sub-class of these aliens on the basis of national origin by treating those residing in Canada and Canadian citizens more favorably than all others. When a state grants benefits, however, it cannot constitutionally distribute those benefits in an impermissible discriminatory manner.[13] Indeed, here the Georgia Supreme Court admits that the workers' compensation statute is discriminatory.

Georgia's statute works an invidious distinction, the nature and intent of which is best illustrated by the historical context in which the law was enacted. Georgia's Workers' Compensation Act, including its alien-dependent exclusion provision, was adopted in 1920 during the movement for the institution of compulsory industrial accident insurance that swept the country from 1909 to 1920. 1920 Ga. Laws 814; Arthur Larson, *The Law of Workmen's Compensation* §§ 5.20, 5.30 (1952 & Supp. 1993). Indeed, one of the most prominent features of our national lore is the great influx of immigrants between the 1880s and the early 1920s. Less celebrated is the nativist, anti-immigrant backlash that accompanied this phenomenon and eventually succeeded in radically altering our national immigration policy.[14]

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ton v. Mow Sun Wong, 426 U.S. 88, 48 L. Ed. 2d 495, 96 S. Ct. 1895 (1976); *Sugarman v. Dougall*, 413 U.S. 634, 37 L. Ed. 2d 853, 93 S. Ct. 2842 (1973); *Graham v. Richardson*, 403 U.S. 365, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 92 L. Ed. 1478, 68 S. Ct. 1138 (1948); *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L. Ed. 220, 6 S. Ct. 1064 (1886).

[13] *Hooper v. Bemalillo County Assessor*, 472 U.S. 612, 86 L. Ed. 2d 487, 105 S. Ct. 2862 (1985) (exploring tax exemption for Vietnam veterans residing in the state before a certain date); *Zobel v. Williams*, 457 U.S. 55, 72 L. Ed. 2d 672, 102 S. Ct. 2309 (1982) (discussing Alaskan residents' distribution plan); *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049 (5th Cir. 1984) (reviewing state's expenditures of tax dollars).

[14] While the Chinese Exclusion Act of 1882 was the first significant inhibition of free immigration to the United States, the cam-

This nativist movement was animated by three fundamental principles: the racial superiority of Anglo-Saxons; bias against Roman Catholics; and hostility to foreign "radicals." John Higham, *Strangers in the Land* 158-334 (1967). Each of these prejudices disfavored immigrants from largely Catholic Mexico, especially when it is observed that this period also witnessed the Mexican Revolution from 1909 to 1920, the consequent increase in immigration from Mexico, and Mexico's association in the mind of the United States with Germany and the Central Powers during World War I. Roger Daniels, *Coming to America* 307, 333 (1990); Paul Enrlich, *The Golden Door* 129-135 (1979); Ricardo Romo, *East Los Angeles: History of a Barrio* 91-110 (1983). This anti-immigrant movement, while national in its reach, found particular fervor in the Southern and Western states, and it is perhaps not surprising in view of the statute at issue here, that the Ku Klux Klan was reborn in Georgia in 1915 and flourished in 1920 with Klan leaders pointing to foreign immigrants as one of the chief evils to be opposed. Higham, *Strangers* at 286-99.

When viewed in the context in which it was adopted, the statute is a vestige of the nativist sentiment infecting public policy at the time of its adoption. This Court has repeatedly confronted and consistently invalidated such state laws, and should not tolerate Georgia's Workers' Compensation law at all. *E.g., Yick Wo v. Hopkins*, 118 U.S. 356, 30 L. Ed. 220, 6 S. Ct. 1064 (1886); *Truax v. Raich*, 239 U.S. 33, 60 L. Ed. 131, 36 S. Ct. 7 (1915); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 92 L. Ed. 1478, 68 S. Ct. 1138 (1948); *Graham v. Richardson*, 403 U.S. 365, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1971).

In the opinion of the Georgia Supreme Court, nonresident aliens do not possess Fourteenth Amendment rights

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paign to restrict immigration reached its zenith and was perhaps the principal political crusade during the first two decades of the 1900s. *See* Roger Daniels, *Coming to America* 246, 365-384 (1990); John Higham, *Strangers in the Land* 158-384 (1967).

because they are not "within its jurisdiction," and cannot be considered a part of the community of individuals that are entitled to constitutional protection. *Barge-Wagener Const. Co. v. Morales*, 263 Ga. 190, 429 S.E.2d at 673. This conclusion, which is devoid of any analytical framework, is based upon a fundamental misconception as to the proper criteria for determining the application of the equal protection clause particularly to nonresident aliens. *But see United States v. Verdugo-Urquidez*, 494 U.S. 259, 108 L. Ed. 2d 222, 110 S. Ct. 1056 (1990); *Johnson v. Eisentrager*, 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936 (1950) (analyzing application of Constitution to nonresident aliens when acts occurred outside of United States).

The Georgia Supreme Court's holding that nonresident aliens do not possess Fourteenth Amendment rights limits the phrase "within its jurisdiction" to include only those nonresident aliens that are within Georgia's physical territory.[15] The court below failed to consider this Court's interpretation in *Plyler v. Doe*, 457 U.S. 202, 214, 72 L. Ed. 786, 102 S. Ct. 2382 (1982), that the equal protection clause applies "to all within a State's boundaries, and to all upon whom the State would impose the obligations of its laws."[16] By making workers' compensation the ex-

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[15] The legislative history of the equal protection clause provides almost no assistance determining the extent and meaning of this phrase. The drafting committee, as a result of deliberating in secret, never cited the purposes of the statement. The floor debates concentrated on the terms for readmission of the southern states and spent little time discussing the equal protection clause. For the most part the discussions focused almost entirely on race. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 342-43 (1866) (remarks of Sen. Howard); *see also* Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Colum. L. Rev. 131 (1950); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding?*, 2 Stan. L. Rev. 5 (1949).

[16] An additional analysis applicable to this case is to look at the connections between the nonresident alien and the United States or a smaller community therein. *See* Symposium, *Due Process and Membership in National Community: Political Asylum and Beyond*, 44 U. Pitt. L. Rev. 165 (1983) (recognizing that equal protection

clusive remedy in a work-related death and limiting any recovery to $1,000.00, Georgia has under the color of authority punitively affected the rights of all nonresident aliens except for Canadian citizens or residents, thereby bringing them within Georgia's jurisdiction.

The Georgia Supreme Court's minimalist interpretation also flies in the face of evolving equal protection jurisprudence. *Alegria v. United States*, 945 F.2d 1523 (11th Cir. 1991); *Lindholm v. United States*, 808 F. Supp. 7 (D.D.C. 1992); *Stebco, Inc. v. United States*, 733 F. Supp. 1387 (S.D. Cal.), *appeal dismissed*, 939 F.2d 686 (9th Cir. 1990); *Garzon v. United States*, 605 F. Supp. 738 (S.D. Fla. 1985).[17] As earlier stated, even the state Supreme Court in both Wisconsin and Texas have read the United States constitution to extend equal protection to nonresident aliens. *See, e.g., Alexander Ranch, Inc. v. Central Appraisal Dist. of Erath County*, 733 S.W.2d 303 (Tex. 1987), *cert. denied*, 486 U.S. 1026, 100 L. Ed. 2d 236, 108 S. Ct. 2005 (1988); *Lehndorff Geneva, Inc. v. Warren*, 74 Wis. 2d 369, 246 N.W.2d 815 (1976). Indeed, this Court on one occasion found it appropriate to resolve the dispute over discriminatory taxation statutes in favor of a nonresident alien, although the Court did not discuss the nonresident status of the taxpayer. *Hillsborough Township v. Cromwell*, 326 U.S. 620, 90 L. Ed. 358, 66 S. Ct. 445 (1946).

In addition to discriminating on the grounds of alienage, the Georgia statute created a distinction based upon

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rights are often determined by community ties experienced between alien and United States); Symposium, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. Pitt. L. Rev. 237 (1983) (exploring and challenging Martin's ideas).

[17] In each of these cases, the lower federal court has recognized that the denial of an appropriate forum to challenge a tax jeopardy assessment would constitute an infringement of the "due process" and "equal protection rights" of nonresident aliens. *Alegria v. United States*, 945 F.2d at 1527-28 (11th Cir. 1991); *Lindholm v. United States*, 808 F. Supp. at 9 (D.D.C. 1992); *Stebco, Inc. v. United States*, 733 F. Supp. at 1390 (S.D. Cal. 1990); *Garzon v. United States*, 605 F. Supp. at 745 (S.D. Fla. 1985).

national origin.[18] Ga. Code Ann. § 34-9-265(b)(5) (Michie 1993). National origin as well as alienage is a suspect classification and therefore enjoy the "heightened judicial solicitude" of a suspect class. *Graham v. Richardson*, 403 U.S. 365, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1971); *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365 (D.N.M. 1980). Justice Rehnquist recognized in a dissenting opinion that a "state statute that classifies aliens on the basis of country of origin is much more likely to classify on the basis of race, and thus conflict with the core purpose of the Equal Protection Clause, than a statute that . . . merely distinguishes between alienage as such and citizenship as such." *Sugarman v. Dougall*, 413 U.S. 634, 655, 37 L. Ed. 2d 853, 93 S. Ct. 2842 (1973) (dissenting opinion). This Court has firmly established that alienage and national origin are suspect classification.

In *Plyler v. Doe*, 457 U.S. 202, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982), this Court further held that illegal alien children do not constitute a suspect class nor warrant strict scrutiny. In considering the applicability of these decisions to nonresident aliens, two points emerge. The first is that these cases deal only with resident aliens, and second, the question of whether nonresident aliens constitute a suspect class has not been decided by this Court. In *Lehndorff Geneva, Inc. v. Warren*, 74 Wis. 2d 369, 246 N.W.2d 815 (1976), and *Alexander Ranch Inc. v. Central Appraisal Dist. of Erath County*, 733 S.W.2d 303 (Tex. 1987), *cert. denied*, 486 U.S. 1026, 100 L. Ed. 2d 236, 108 S. Ct 2005 (1988), both state Supreme Courts applied the rational basis standard to nonresident aliens. In *Sailer v. Tonkin*, 356 F. Supp. 72 (V.I. 1973), however, the federal court did use strict

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[18] Discrimination on the basis of national origin was scrutinized by the Court in *Korematsu v. United States*, 323 U.S. 214, 89 L. Ed. 194, 65 S. Ct. 193 (1944), where the Court examined statutory distinctions based upon a person's ancestry and descent. As an example of national origin, in *Korematsu*, the petitioner was an American citizen of Japanese descent.

scrutiny to invalidate a nonresident alien classification.[19] Whatever level of scrutiny this Court decides to apply, the Georgia Workers' Compensation Act cannot withstand that judicial scrutiny.

III. THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION CONCERNING THE CONSTITUTIONALITY OF A STATE'S WORKERS' COMPENSATION ACT WHICH, BY MAKING DISTINCTIONS BASED UPON ALIENAGE AND NATIONAL ORIGIN, INSERTS THAT STATE INTO THE SPHERE OF FOREIGN AFFAIRS THAT IS EXCLUSIVE TO THE FEDERAL GOVERNMENT

This Court, for over a considerable number of years, has not confronted the exclusivity of the federal government's power in the field of foreign affairs. *See Zschernig v. Miller*, 389 U.S. 429, 19 L. Ed. 2d 683, 88 S. Ct. 664 (1968); *Clark v. Allen*, 331 U.S. 503, 91 L. Ed. 1633, 67 S. Ct. 1431 (1947). In Georgia, this void has permitted a statute that has a persistent and subtle effect on foreign relations. Out of all the countries of the world, Georgia has decided that only Canadian citizens or other residents of Canada are deserving of equal treatment with United States citizens or residents. Whether Ms. Morales and her children lived in Great Britain, Japan, Germany, or in any of the Latin American countries, it would make no difference. On the other hand, had Ms. Morales resided in Canada, she would receive the same benefits as a United States citizen would under the statute. Allowing the Georgia Workers' Compensation Act to stand would establish a dangerous precedent in that nothing would prevent each state in the Union from selecting a different nation to receive such special treatment.[20]

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[19] The federal district court did not, however, analyze the distinctions between resident and nonresident aliens. Essentially the court held that the portion of the Virgin Islands Criminal Compensation Act which denied compensation to a nonresident alien visitor to the territory did not meet the compelling state interest necessary for a suspect class.

[20] For example, if the statute is allowed to stand, perhaps states in the Southwest will prefer to extend this special status to Mexico. Perhaps states in the Northwest will prefer to confer this special

The United States Constitution reserves the field of foreign affairs exclusively for the federal government. *Hines v. Davidowitz*, 312 U.S. 52, 63, 85 L. Ed. 581, 61 S. Ct. 399 (1941) (concluding that "our system of government is such that the interest of the cities, counties, states, no less than the interests of the people of the whole nation, imperatively requires that the federal power in the field affecting foreign relations be left entirely free from local interference"); see also *Chae Chan Ping v. United States* ("Chinese Exclusion Case"), 130 U.S. 581, 606, 32 L. Ed. 1068, 9 S. Ct. 623 (1888). This principle emanates from several provisions of the United States Constitution. Illustrative of this principle is the President's and the Senate's powers to make treaties; [21] the President's and the Congress' powers to make war; [22] and the prohibition on states to enter into a compact with foreign governments.[23] James Madison eloquently summarized with penetrating insight this concept when he said in *The Federalist* No. 42 (James Madison) that, "if we are to be one nation in any respect, it clearly ought to be in respect to other nations." In sum, individual states may not intrude into the exclusive federal sphere of foreign affairs.

This Court in *Zschernig v. Miller*, 389 U.S. 429, 19 L. Ed. 2d 683, 88 S. Ct. 664 (1968), struck down an Oregon statute that prohibited nonresident aliens from receiving property through the Oregon probate courts unless certain conditions were satisfied. 389 U.S. at 430-31.[24] This Court found that such a statute had "led into

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benefit on Canada. Perhaps cities containing a large Jewish population will prefer Israel in some fashion. It is precisely this type of state preference for a particular foreign nation that the United States Constitution prohibits.

[21] U.S. Const. art. I, § 2, cl. 2.

[22] U.S. Const. art. II, § 2, cl. 1; U.S. Const. I, § 8, cl. 11; U.S. Const. art. I, § 8, cl. 12.

[23] U.S. Const. art. I, § 10, cl. 3.

[24] First, Oregon required that the country in which the beneficiary resided maintain a reciprocal right for United States citizens to receive property. Second, Oregon insisted that the foreign

minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation" on whether nonresident aliens actually received the benefits of the property or money. 389 U.S. at 435. Moreover, this Court observed that such a statute, which allows for such inquiry, could lead to inflammatory statements by state court judges regarding the Soviet block countries and therefore could affect foreign affairs. 389 U.S. at 438, n.8. Consequently, this Court concluded that the Oregon statute unconstitutionally encroached into foreign affairs because it made "unavoidable judicial criticism of nations established on a more authoritarian basis than our own" and "affect[ed] international relations in a persistent and subtle way." 389 U.S. at 440.

Some courts have interpreted *Zschernig* as only stating that "judicial criticism of foreign governments is, then, constitutionally impermissible." *Shames v. Nebraska*, 323 F. Supp. 1321, 1322 (D. Neb. 1971), *aff'd* 408 U.S. 301, 33 L. Ed. 2d 321, 92 S. Ct. 2478 (1972). *See Hines v. Davidowitz*, 312 U.S. 52, 85 L. Ed. 2d 581, 61 S. Ct. 399 (1941). The proper distinction, however, is between federal and the state legislature. *See* Kevin P. Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 Tul. L. Rev. 469 (1987).

The Georgia statute is more like the statute in *Zschernig*, and much different from the statute that was the subject of this Court's inquiry in *Clark v. Allen*, 331 U.S. 503, 91 L. Ed. 1633, 67 S. Ct. 1431 (1947). In *Clark*, this Court sustained the California statute because its effect on other countries was incidental or indirect. What offended this Court in *Zschernig*, however, was that

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country allow United States citizens to receive funds from estates in that country. Third, a foreign resident had to establish that he would receive the benefit of money or property from the estate of or persons dying in Oregon "without confiscation, in whole or in part," by his government. *Id.* at 430, n.1, *citing* Or. Rev. Stat. § 111.070 (1957).

the structure of the statute facilitated, in that instance through the judiciary, the state's insertion into the exclusive province of the federal government to conduct foreign affairs. The Georgia statute is strikingly similar but with a slight twist. The statute is not structured to allow the judiciary to make an assessment of foreign policy before passing on the quality of rights to be extended to the nonresident alien. Instead, by discriminating on the basis of national origin and alienage, Georgia has codified its criticism of all other nations and perforce has injected itself into the field of foreign affairs. As a consequence, the Georgia courts are forced to relegate all nationalities except for Canadians to second class status. This directly offends this Court's holding in *Zschernig*.

It is not the judicial nature of the criticism, but that a statute, such as the Georgia Workers' Compensation Act, facilitates criticism. Allowing a state to select the citizens or residents of a nation for preferred status no doubt is a form of criticism, expressed or not, of those country's citizens or residents who are not favored for preferred status. The exercise of such powers cannot only have a corrosive effect on the separation of powers between the state and federal government in the area of foreign affairs, but also in the United States' relationships with other foreign governments. It is difficult to imagine that the Framers intended to preclude only state judicial criticism of foreign governments by reserving the policy of foreign affairs to the federal government. *See The Federalist* No. 42 (James Madison). Foreign affairs is exclusively a domain of the federal government.

Although the Georgia statute has been in effect for over seventy years and, as a practical matter, may have had little influence on foreign policy, this Court has held that, when dealing with constitutional questions, what may happen must be considered. *See, e.g., Arizona v. Hicks*, 480 U.S. 321, 325, 94 L. Ed. 2d 347, 107 S. Ct. 1149 (1987). Furthermore, we must remember that "[e]xperience has shown that international controversies of the gravest moment, sometimes even leading to war, may

arise from real or imagined wrongs to another subject's inflicted, or permitted by a government." *Hines v. Davidowitz*, 312 U.S. 52, 64, 85 L. Ed. 581, 61 S. Ct. 399 (1941). In the field of foreign affairs what is insignificant today may be significant tomorrow.

Last, the Georgia Workers' Compensation Act is at the very least a compact with a foreign government, and, therefore, violates the United States Constitution. One cannot be constrained to the literal interpretation of "compact." *See, e.g., Olmstead v. United States*, 227 U.S. 438, 72 L. Ed. 944, 48 S. Ct. 564 (1928) (Brandeis, J., dissenting) (holding that "a principle to be vital must be capable of wider application than the mischief which gave it birth . . . in the application of Constitution, therefore, our application cannot be only what has been but of what may be").

This Court has also never had the opportunity to determine whether a state by virtue of its statutes enters into a compact, as defined under Article I, Section 10, Clause 3 of the United States Constitution, with a foreign nation. As noted above, the Georgia statute benefits the citizens of one country. Although Canada may not have bargained for this advantage, the purpose of the Compact Clause is to prevent states from differentiating among foreign governments in this manner. Georgia has, by virtue of its statute, decided to elevate Canada to a special status among nations.

Fundamental to the concept of federalism is the separation of powers between the state and federal government. Nowhere is this principle more basic to a national government than in the field of foreign affairs. As Justice Sutherland stated in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316, 81 L. Ed. 255, 57 S. Ct. 216 (1936), "[e]ven before the Declaration [of Independence], the colonies were united in foreign affairs." Even though Georgia's Workers' Compensation Act is subtle, it nonetheless is an intrusion into the federal government's exclusive domain over foreign affairs. Such a statute, which arbitrarily selects a nation for favorable treatment to the

exclusion of all others, without at a minimum consulting with the federal government is perilous. Unless reversed, the Georgia Supreme Court decision legitimizes an unlawful intrusion of the state into the ability of this nation to speak with one voice in foreign affairs.

CONCLUSION

For the foregoing reasons, Amici pray that Petitioners Writ of Certiorari to review the Judgment and Opinion of the Supreme Court of Georgia in this case be granted.

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No. 93-432

In The

Supreme Court of the United States

October Term, 1993

JOSE A. MORALES (Deceased/Employee), JULIA CORPUS de MORALES (Widow), JUAN ANTONIO MORALES and DANIEL MORALES (Minor Children),

Petitioners,

v.

BARGE-WAGENER CONSTRUCTION COMPANY
(Employer)
and
ARGONAUT INSURANCE COMPANY
(Insurer),

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court For The State Of Georgia

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF GEORGIA

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF GEORGIA 1

I. INTRODUCTION 1

II. THE GEORGIA SUPREME COURT'S DECISION DISPOSED OF PETITIONERS' FEDERAL EQUAL PROTECTION CLAIMS IN A DECISION INTERWEAVING BOTH FEDERAL AND STATE LAW GROUNDS, THEREBY ESTABLISHING A PROPER BASIS FOR THIS COURT'S JURISDICTION 2

III. THE ALLEGED REMITTITUR PROCEDURAL DEFAULT ARGUED BY APPELLEE IS SIMPLY NON-EXISTENT 9

IV. THE SUPREMACY CLAUSE ISSUE RAISED BY PETITIONERS IS INHERENTLY IMPLICATED BY THEIR FOURTEENTH AMENDMENT EQUAL PROTECTION CLAIM 9

V. CONCLUSION 10

Appendix

Order of the Supreme Court of Georgia granting Application for Discretionary Appeal 1B

Order of the Superior Court of Fulton County for the State of Georgia directing transfer of record to the Supreme Court of Georgia 3B

TABLE OF AUTHORITIES

Page

CASES:

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) (Brandeis, H. concurring) 2

Cohen v. Cowles Media Co., ___ U.S. ___, 115 L.Ed.2d 586 (1991) 6, 7

Curry v. Construction & General Laborers Union, 131 S.E.2d 559 (1963) 9

Cuyler v. Sullivan, 446 U.S. 335 (1980) 10

Delaware v. Prouse, 440 U.S. 648 (1979) 9

De Ayala v. Florida Farm Bureau Casualty Insurance Co., 543 So.2d 204 (1989) 3

Dunwoody-Woodlands Condo Assn. v. Hedquist, 403 S.E.2d 893 (1991) 4

First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987) 7

Grissom v. Gleason, 418 S.E.2d 27 (1992) 8

Graham v. Richardson, 403 U.S. 365 (1971) 10

Holcomb v. Gray, 214 S.E.2d 512 (1975) 5

Johnson v. Eisentrager, 339 U.S. 763 (1950) 2, 7

Michigan v. Long, 463 U.S. 1032 (1983) 8

Orr v. Orr, 440 U.S. 268 (1979) 6

Pennsylvania v. Muniz, 496 U.S. 582 (1990) 8

People of State of New York v. Zimmerman, 278 U.S. 63 (1928) 6

Procunier v. Navarette, 434 U.S. 555 (1978) 10

TABLE OF AUTHORITIES – Continued

Page

Quinn v. Millsap, 491 U.S. 95 (1989) 9

Simmons v. Boros, 341 S.E.2d 2 (1986) 4

Shapiro v. Lipman, 377 S.E.2d 673 (1989) 4

Street v. New York, 394 U.S. 576 (1969) 6

Takahashi v. Fish & Game Commission, 334 U.S. 410 (1948) 10

The State v. Stewart, 398 S.E. 2d 270 (1990), on appeal after remand from the Supreme Court, 411 S.E.2d 110 (1992) 9

Truax v. Raich, 239 U.S. 33 (1915) 10

U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990) 2, 7

Vance v. Terrazas, 444 U.S. 252 (1980) 10

Webb v. Webb, 451 U.S. 493 (1981) 5

Webb's Fabulous Pharmacies Inc. v. Beckwith, 449 U.S. 155 (1980) 6, 7

Zacchini v. Scripps-Howard, 433 U.S. 562 (1977) 9

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment XIV .... *passim*

United States Constitution, Article VI 9, 10

STATUTES:

O.C.G.A. §34-9-265 ..... *passim*

GEORGIA SUPREME COURT RULES:

RULE 45 4

RULE 61 9

No. 93-432

In The

Supreme Court of the United States

October Term, 1993

JOSE A. MORALES (Deceased/Employee), JULIA CORPUS de MORALES (Widow), JUAN ANTONIO MORALES and DANIEL MORALES (Minor Children),

Petitioners,

v.

BARGE-WAGENER CONSTRUCTION COMPANY
(Employer)
and
ARGONAUT INSURANCE COMPANY
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Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court For The
State Of Georgia

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF GEORGIA

I. INTRODUCTION

The Petition for Writ of Certiorari properly invokes this Court's jurisdiction to review important federal equal protection questions incorrectly passed upon by the Georgia Supreme Court and inconsistently resolved by the highest courts of six different states. The Georgia Supreme Court decided this case predicated in significant

part upon its view of controlling Fourteenth Amendment and federal law. The court's decision turned on its view of this Court's decisions in *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990) and *Johnson v. Eisentrager*, 339 U.S. 763 (1950) as well as on the equivalence of the equal protection provisions of the United States and Georgia Constitutions. In sustaining the constitutionality of O.C.G.A. § 34-9-265(b)(5), the Court was required to pass on and reject the merits of petitioners' claims under both the United States and Georgia Constitutions.

II. THE GEORGIA SUPREME COURT'S DECISION DISPOSED OF PETITIONERS' FEDERAL EQUAL PROTECTION CLAIMS IN A DECISION INTERWEAVING BOTH FEDERAL AND STATE LAW GROUNDS, THEREBY ESTABLISHING A PROPER BASIS FOR THIS COURT'S JURISDICTION.

The petitioners raised both the federal Fourteenth Amendment and state equal protection claims before the trial court and the State Board of Workers' Compensation below. (App. 15A, 19A, 24A) After finding the equal protection clauses of the Georgia and United States Constitutions "substantially equivalent," the trial court concluded that O.C.G.A. § 34-9-265(b)(5) violated the Georgia Constitution and for prudential reasons determined that "it was not necessary" to reach petitioners' federal constitutional claims. (App. 19A) *C.f., Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936) (Brandeis, H. concurring).

Respondent Barge-Wagener's subsequent Application for Discretionary Appeal to the Georgia Supreme

Court clearly recognized that the parallel federal constitutional claim would per force be decided by the Court. In fact, a seven page section of the Application is entitled "O.C.G.A. § 34-9-265(b)(5) is not unconstitutional under the Equal Protection Clause of the Federal Constitution."

Upon granting the Application for Discretionary Review, the Georgia Supreme Court specifically requested that the parties direct their appellate briefs to the state constitutional equal protection issue raised by the case. (App. 1B, Order of the Georgia Supreme Court granting discretionary appeal, included herein as a supplemental appendix). Petitioners Morales' briefs before the Georgia Supreme Court thus properly focused on the state constitutional issue posed by the case, pursuant to the Court's precise directive on this issue.[1] However, the underlying federal claim clearly remained at issue as it was integrally intertwined with the state equal protection claim and federal constitutional analysis urged by the parties. Additionally, the federal question was preserved in the trial court's judgment and record expressly accepted for review by the Supreme Court. By order of the Superior Court, the full record of the lower court and administrative proceedings and briefs had been transmitted for the Supreme Court's review.[2] (App. 3B, included herein).

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[1] In arguing that the Georgia Supreme Court should follow *de Ayala v. Florida Farm Bureau Casualty Insurance Co.*, 543 So.2d 204 (1989), petitioners also pressed the Court to adopt *de Ayala's* application of federal "strict scrutiny" equal protection analysis of the disparate treatment of workers on the basis of alienage under O.C.G.A. § 34-9-265(b)(5).

[2] The record, therefore, included briefs and pleadings submitted on behalf of Petitioners Morales to the Superior Court

Respondent's allegation that petitioners Morales failed to comply with Georgia Supreme Court Rule 45 and thereby abandoned their federal constitutional claim is blatantly wrong. Rule 45 applied solely to Barge-Wagener's responsibility, *as the appellant* before the Supreme Court, to identify the "enumerations of error" below which it wished to challenge.

Justice Benham's dissent clearly recognized that the Court had in fact disposed of *both* the federal and state constitutional equal protection claims:

> This matter is before the court mainly to determine whether OCGA § 34-9-265(b)(5) violates the Equal Protection Clauses of the Georgia Constitution and the United States Constitution . . . .
>
> We must determine . . . whether this dissimilar treatment rises to the level of constitutional impermissibility. The claim is made that this conduct is violative of the Equal Protection provisions of both the Georgia Constitution and the Fourteenth Amendment of the United States Constitution, *which provisions are, as the majority points out, substantial equivalents.*

(App. 8A, 11A) (emphasis added).

Under controlling Georgia precedent, if the judgment of the Superior Court is "right for any reason [it] must be affirmed." *Shapiro v. Lipman*, 377 S.E.2d 673 (1989); *Simmons v. Boros*, 341 S.E.2d 2 (1986); *Dunwoody-Woodlands*

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and State Workers' Compensation Board expressly identifying the Fourteenth Amendment equal protection claims and issues as well as state constitutional claims raised by the case.

Condo Assn. v. Hedquist, 403 S.E.2d 893 (1991). This is consonant with "the policy of both appellate courts in Georgia . . . to reach the merits of every case when it can be done consistent with the mandate of the law." *Holcomb v. Gray*, 214 S.E.2d 512 (1975). The Supreme Court therefore by definition reached and rejected the petitioners' federal constitutional claims when it reversed the judgment below – with the full record before it, including the Fourteenth Amendment constitutional issues addressed but not reached by the Superior Court.[3]

The Georgia Supreme Court would have affirmed the Superior Court judgment under the "right for any reason" affirmance requirement if it had concluded that the Superior Court judgment could be sustained based upon petitioners' underlying federal claims preserved in the record. The Court's straight reversal of the Superior Court judgment instead meant that the petitioners' federal as well as state constitutional claims had necessarily been reached and rejected.

This Court's jurisdiction is established "regardless of whether a party raised below and argued a federal-law issue that the state supreme court actually considered

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[3] *Webb v. Webb*, 451 U.S. 493 (1981), cited by Barge-Wagener in support of its claim abandonment argument, is simply inapposite here. In *Webb*, the petitioner, although obligated *as the appellant* to raise the errors below before the Georgia Supreme Court, never explicitly raised or briefed a federal constitutional claim in *any* state court proceedings. In contrast to the instant case, *neither* the majority nor dissenting state court opinion in *Webb* indicated an awareness that any federal question was directly or indirectly presented by the case, as noted by this Court. Id. at 495.

and decided." *Cohen v. Cowles Media Co.*, ___ U.S. ___, 115 L.Ed.2d 586, 595-96 (1991) and cases cited therein; *Webb's Fabulous Pharmacies Inc. v. Beckwith*, 449 U.S. 155, 159 n.5 (1980); *Orr v. Orr*, 440 U.S. 268, 274-75 (1979). "[I]t is not necessary that the ruling shall have been in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough." *People of State of New York v. Zimmerman*, 278 U.S. 63, 67 (1928).[4]

Furthermore, the federal equal protection questions posed by this case were raised and passed upon by the state courts below as issues wholly interrelated to disposition of the co-extensive state equal protection claim.[5] A federal question is thus "necessarily decided," as in the instant case, where the question is injected into the case due to the intertwinement of federal and state law issues or the existence of parallel federal and state constitutional

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[4] Barge-Wagener's response brief thus incorrectly summarizes the current jurisdictional jurisprudence of this Court when it says: "To be clear, this Court requires that such federal question be *both* raised and passed upon by the court below." (Appellee's Response to Petition at page 9) (emphasis added). However, if there is any doubt regarding whether the federal equal protection claim was presented, the record as a whole here affirmatively demonstrates that the federal question was indeed presented to and passed upon by the Georgia courts and on terms consistent with the briefing directive of the Georgia Supreme Court. *See, Street v. New York*, 394 U.S. 576, 581-82 (1969); *People of New York v. Zimmerman*, 278 U.S. at 67.

[5] As the Georgia Supreme Court treated the federal and state equal protection provisions as co-extensive in reviewing the constitutionality of O.C.G.A. § 34-9-265(b)(5), special federal-state comity concerns are not implicated by review of this case.

provisions. *E.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. at 159 n.5 (generalized due process arguments regarding Florida Constitution and its federal counterpart established jurisdiction for review of federal issue *despite fact that Federal Constitution not mentioned in the state court opinion*); *Cohen v. Cowles Media Co.,* 115 L.Ed.2d at 595-596 (where state court decision based upon construction of state claim in conjunction with the First Amendment defense, federal constitutional issue deemed presented); *First Lutheran Church v. Los Angeles County,* 482 U.S. 304, 313 n.8 (1987), (state court dismissal of state constitutional claim raised federal question because, in dismissing the claim, the court considered whether state court precedent governing the decision was contrary to recent decisions construing the federal constitution).

In the present case, not only did the Georgia Supreme Court's decision "necessarily decide" the petitioners' federal claim, it expressly rested its holding on the federal constitutional analysis urged by Barge-Wagener in defense of the statute. Thus, the majority concluded that Petitioners' constitutional claims were barred by controlling federal law, contrary to the dissent's view that the statutory scheme violated the Fourteenth Amendment. ("The U.S. Constitution 'expressly accord[s] differing protections to aliens than to citizens' *U.S. v. Verdugo-Urquidez,* 494 U.S. 359 (110 SC 1056, 108 LE2d 222 (1990). . . . The United States Supreme Court . . . has been clear that it is the alien's presence within its territorial jurisdiction that gives the Judiciary power to act. *Johnson v. Eisentrager,* 339 U.S. 763, 770-71 (70 SC 936, 94 LE 1255 (1950)"). (App. 5A)

For these same reasons, it is palpably clear that the Georgia Supreme Court's decision was so "interwoven" with federal law that it could not rest on an independent and adequate state ground. As reformulated in *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), the Court's "independent and adequate state grounds" doctrine provides that:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Respondent's independent and adequate state grounds argument is directly refuted by the Georgia Supreme Court's reliance on federal constitutional law in construing the scope of constitutional protection afforded under federal and state equal protection provisions deemed equivalent.[6] Further, the Georgia Supreme Court's decision lacks the "plain statement" required by *Long* that its reference to federal precedent is merely for guidance. *Id.* at 1042. *C.f., Pennsylvania v. Muniz*, 496 U.S.

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[6] *See also, Grissom v. Gleason*, 418 S.E.2d 27, 29 (1992) (reiterating that the Equal Protection Clauses of the United States and Georgia Constitutions are co-extensive but not foreclosing the possibility that the state provision in the future may be more broadly construed). Indeed, petitioners' unsuccessful motion for reconsideration clearly sought to persuade the Court, at a minimum, to construe the state Equal Protection Clause more broadly than the Court believed federal law required.

582, 588 n.4 (1990) (state court decision did not rest on independent and adequate ground where self-incrimination provisions of state and federal constitution viewed as identical); *Zacchini v. Scripps-Howard*, 433 U.S. 562, 568 (1977) (jurisdiction properly established where state law applied in light of federal constitutional considerations although state court judgment ultimately rested on state law). *See also, Quinn v. Millsap*, 491 U.S. 95, 102 n.6 (1989); *Delaware v. Prouse*, 440 U.S. 648, 652-53 (1979).

III. THE ALLEGED REMITTITUR PROCEDURAL DEFAULT ARGUED BY APPELLEE IS SIMPLY NON-EXISTENT.

Barge-Wagener's contention that Rule 61 of the Georgia Supreme Court Rules is a mandatory state procedural requirement is simply erroneous. The Rule's language is facially permissive, not mandatory, consistent with the varying need for stays in different cases. If a party elects not to stay the remittitur when a State Supreme Court decision is appealed to the United States Supreme Court, an alternative remittitur procedure has been approved by Georgia's appellate courts. The remittitur of the United States Supreme Court is directly transmitted to the trial court for implementation, pursuant to *Curry v. Construction & General Laborers Union*, 131 S.E.2d 559 (1963) and *The State v. Stewart*, 398 S.E.2d 270 (1990), on appeal after remand from the Supreme Court, 411 S.E.2d 110 (1992).

IV. THE SUPREMACY CLAUSE ISSUE RAISED BY PETITIONERS IS INHERENTLY IMPLICATED BY THEIR FOURTEENTH AMENDMENT EQUAL PROTECTION CLAIM.

This Court's Fourteenth Amendment alienage discrimination jurisprudence has consistently recognized

that Supremacy Clause issues are inherently implicated by discriminatory state statutory schemes. *Graham v. Richardson*, 403 U.S. 365, 376-83 (1971); *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 419 (1948); *Truax v. Raich*, 239 U.S. 33 (1915). Accordingly, the Supremacy Clause issue raised by the Petition is a subsidiary issue embraced within the fundamental federal equal protection issue posed by this case and is thereby properly before the Court. *C.f., Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980); *Cuyler v. Sullivan*, 446 U.S. 335, 342-43 (1980); *Procunier v. Navarette*, 434 U.S. 555, 559-60 n.6 (1978).

V. CONCLUSION

The federal equal protection principles at stake in this case are pivotal in the Georgia Supreme Court's decision herein as well as in the conflicting decisions of all other state courts of last resort which have passed upon this fundamental equal protection question raised by the Petition. The Petition for Writ of Certiorari properly presents important federal constitutional questions within the Court's jurisdiction to review.

Dated: Atlanta, Georgia, October 29, 1993.

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APPENDIX

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STATE JUDICIAL BUILDING
ATLANTA 30334

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Richard Bell
Willis D. Hunt, Jr.
Robert Benham
Norman S. Fletcher
Leah J. Sears-Collins
Justices

Joline B. Williams, Clerk
Wm. Scott Henwood,
Reporter

OCT 7 1992

TO ALL COUNSEL:

RE: Application No. S92D1530. , Barge-Wagener Construction Co. et al. v. Julia Corpus De Morales

The Court today granted this application for discretionary appeal. Clarke, C.J., Bell, P.J., Hunt, Benham, Fletcher, and Sears-Collins, JJ., concur.

Your notice of appeal must be filed in the trial court within 10 days from this date. When the record is received from the trial court and docketed in this Court you will be sent a docketing notice showing the date of docketing and the Case Number assigned. The appellant's enumeration of errors and briefs will be due in this Court within 20 days from the date of docketing; the appellee's briefs will be due within 40 days from the date of docketing or within 20 days after the appellant's briefs are filed, whichever is later.

The Court is particularly concerned with, and requests that you address in your briefs, the following:

Whether OCGA § 34-9-265 (b) (5) violates equal protection under the Georgia Constitution?

Joline B. Williams, Clerk

BY: Lynn M. Stinchcomb

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

IN RE: JOSE ANTONIO MORALES, (Deceased Employee), with JUAN ANTONIO MORALES, Claimant, (Dependent Child), DANIEL MORALES, (Dependent Child), and JULIA CORPUS DE MORALES, (Widow/ Claimant),	:	FULTON COUNTY SUPERIOR COURT CIVIL ACTION FILE NO. E-03875
Appellee/Claimant,	:	STATE BOARD OF WORKERS COMPENSATION CLAIM NO. 451-93-5853
v.	:	(Filed Nov. 4, 1992)
BARGE-WAGENER CONSTRUCTION COMPANY,	:	
Appellant/Employer,	:	
and	:	
ARGONAUT INSURANCE COMPANY,	:	
Appellee/Insurer.	:	

ORDER TO THE CLERK OF SUPERIOR COURT TO TRANSFER THE ENTIRE FILE OF THE STATE BOARD OF WORKERS' COMPENSATION TO THE SUPREME COURT OF GEORGIA

The Supreme Court of Georgia has granted an Application for Discretionary Appeal of the Order of this Court in the above-referenced case. In order to facilitate the docketing of this Appeal with the Supreme Court, the Clerk of Fulton County Superior Court is hereby ordered

to forward both the complete file and record of the State Board of Workers' Compensation, and the complete file and record of the Superior Court to the Supreme Court.

This the 2nd day of ~~October~~ November, 1992.

/s/ Don A Langham
DON A. LANGHAM, JUDGE
SUPERIOR COURT OF
FULTON COUNTY